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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0363-15T1

QUATONYA BRITTINGHAM,

Plaintiff-Appellant,

and

DONTE GOREE,

Plaintiff,

v.

JACLYN GASPARI,

Defendant-Respondent,

and

KATHLEEN BRABAZON,

Defendant.

Argued October 6, 2016 – Decided December 6, 2016

Before Judges Messano and Guadagno.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1816-13.

Jeremy M. Weitz argued the cause for appellant (Spear, Greenfield, Richman & Weitz, P.C., attorneys; Marc F. Greenfield and Mr. Weitz, on the brief).

Catherine A. Schmutz argued the cause for respondent (Law Offices of Styliades and Jackson, attorneys; Ms. Schmutz, of counsel and on the brief).

PER CURIAM

Following trial, a jury returned a no cause verdict by determining plaintiff Quatonya Brittingham had not suffered a permanent injury, N.J.S.A. 39:6A-8(a), as a result of an automobile accident in which plaintiff's car was rear-ended by a vehicle driven by defendant Jaclyn Gaspari. Plaintiff subsequently moved for a new trial, which the judge denied.

In anticipation of trial, the parties videotaped the de bene esse depositions of their respective medical experts. Plaintiff's expert, Dr. Mark D.T. Allen, a Board-certified orthopedic surgeon, did not treat plaintiff. However, after conducting an examination and reviewing imaging studies and medical records, Dr. Allen opined plaintiff suffered disc herniations at the C7/T1 and L4/L5 levels of her spine as a result of the accident. Dr. Allen also concluded plaintiff's injuries were permanent in nature.

Defendant's expert, Dr. Wayne Kerness, also a Board-certified orthopedic surgeon, examined plaintiff and reviewed her medical records and imaging studies. Dr. Kerness agreed plaintiff's MRI films revealed herniated discs at the levels already noted. However, the doctor concluded plaintiff's examination was normal,

with little evidence of pain or restricted range of motion. When asked what caused the herniations, Dr. Kerness stated he could not say with "certainty, but most likely they . . . were there. They were probably pre-existing[,]" an opinion expressed in the doctor's report. Dr. Kerness opined plaintiff suffered non-permanent sprains to her spine as a result of the accident. During cross-examination, the doctor admitted he gave no explanation in his report for concluding the herniations were pre-existing.

On re-direct, Dr. Kerness was asked to explain how the herniations might result from "something non-traumatic." The doctor said that with respect to plaintiff's lower back, it might be the result of her pregnancy.¹ Plaintiff's counsel lodged an objection. Dr. Kerness continued to explain herniations are sometimes "degenerative in nature[,]" although "not necessarily in this case." He also testified sometimes the cause is unknown, and herniations are found in individuals that are "totally asymptomatic."

On re-cross, the doctor acknowledged he had no "evidence whatsoever to substantiate that [plaintiff's] herniated discs were caused by pregnancy or a degenerative process," describing those alternatives as "just possibilities." Nevertheless, Dr. Kerness

¹ Plaintiff was seven-months pregnant at the time of the accident.

said these things were "more likely the reason for the disc herniation than . . . trauma."

Plaintiff moved in limine immediately before trial to exclude portions of Dr. Kerness's deposition. Plaintiff did not seek to bar the doctor's opinion that the herniations pre-existed the accident; instead she sought to bar only the re-direct examination in which the doctor explained possible non-traumatic reasons for herniations, including plaintiff's pregnancy. Plaintiff's counsel agreed that if the testimony was excluded, he would formally withdraw his entire re-cross of the doctor.

The parties orally argued the motion before the trial judge.² Plaintiff's counsel argued Dr. Kerness's opinion that the herniations were pre-existing, although contained in his report, lacked any foundation and was a net opinion. The judge noted plaintiff never sought to bar the report as a net opinion. He further concluded that on re-direct examination the doctor spoke of other "circumstances" that might have caused the herniations. The judge explained Dr. Kerness was "not pointing to any particular" cause, but rather only opined that the accident did not cause the herniations. Subject to some minor edits, the judge

² The judge also made rulings on defendant's in limine motion to exclude portions of Dr. Allen's videotaped deposition.

permitted the deposition, including plaintiff's re-cross examination, to be played for the jury.

After the verdict, plaintiff moved for a new trial, asserting the judge erred in deciding her in limine motion. Plaintiff argued Dr. Kerness "offer[ed] an unsubstantiated opinion that the herniated discs were not likely caused by the accident" The judge denied the new trial motion, relying on the reasons stated at the time he denied plaintiff's in limine request.

Before us, in a single point, plaintiff contends she was entitled to a new trial because the opinion offered by Dr. Kerness was an inadmissible net opinion and should have been excluded. We have considered this argument in light of the record and applicable legal standards. We affirm.

A trial judge "shall grant" a motion for a new trial "if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law." R. 4:49-1(a). "This standard applies whether the motion is based upon a contention that the verdict was against the weight of the evidence, or is based upon a contention that the judge's initial trial rulings resulted in prejudice to a party." Hill v. N.J. Dept. of Corr., 342 N.J. Super. 273, 302 (App. Div. 2001) (citing Crawn v. Campo, 136 N.J. 494, 510-12 (1994)). "On appeal, we

consider essentially the same standard." Ibid. (citing R. 2:10-1). Even if there were legal errors during the trial, we accord deference to the trial judge's evaluation of the prejudice that resulted, and whether that prejudice contributed to an unjust result. Ibid. (citing Crawn, supra, 136 N.J. at 512).

We apply a "deferential approach" and review the decision to admit expert testimony "against an abuse of discretion standard." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371-72 (2011) (citing Kuehn v. Pub Zone, 364 N.J. Super. 301, 319-21 (App. Div. 2003), certif. denied sub nom., Kuehn v. Kerkoulas, 178 N.J. 454 (2004)). The trial court "must ensure that the proffered expert does not offer a mere net opinion." Id. at 372 (citing Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)).

"The net opinion rule . . . mandates that experts be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable." Townsend v. Pierre, 221 N.J. 36, 55 (2015) (internal quotation marks omitted). However, "[t]he net opinion rule . . . does not mandate that an expert organize or support an opinion in a particular manner that opposing counsel deems preferable." Id. at 54.

Plaintiff contends Dr. Kerness's statement that the herniations pre-existed the accident was a net opinion unsupported

by any evidence. She notes that when pressed, Dr. Kerness essentially admitted he lacked any evidence that the herniations resulted from plaintiff's pregnancy or degeneration.

However, plaintiff bore the burden of proving the accident caused a permanent injury; defendant was not required to prove anything, including an alternative cause of plaintiff's disc herniations. "An expert's proposed testimony should not be excluded merely 'because it fails to account for some particular condition or fact which the adversary considers relevant.'" Ibid. (quoting Creanga v. Jardal, 185 N.J. 345, 360 (2005)).

The critical opinion offered by Dr. Kerness was that plaintiff did not suffer a permanent injury caused by the accident. That opinion was based on more than review of the MRI images, which Dr. Kerness acknowledged showed disc herniations. Instead, Dr. Kerness described his examination of plaintiff, which revealed she was able to perform certain tests, as well as her tasks at work, and she was capable of living her life without significant pain or restriction. The doctor explained individuals in the general population have disc herniations that are asymptomatic, not necessarily detected and not routinely caused by trauma. Dr. Kerness's opinion that plaintiff's disc herniations were not "permanent" injuries caused by the accident was not a net opinion.

Affirmed.

