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This opinion shall not "constitute precedent or be binding upon any court."  
Although it is posted on the internet, this opinion is binding only on the  
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-3863-14T3

JENNIFER LLANES,

Plaintiff-Appellant,

v.

ALLSTATE NEW JERSEY  
INSURANCE COMPANY,

Defendant-Respondent,

and

JOHNNIE MOORE,

Defendant.

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Submitted September 27, 2016 – Decided December 28, 2016

Before Judges Messano and Suter.

On appeal from the Superior Court of New  
Jersey, Law Division, Hudson County, Docket  
No. L-1214-13.

Lesnevich, Marzano-Lesnevich & Trigg, LLC,  
attorneys for appellant (Domhnall Ó'Catháin,  
of counsel and on the brief).

Kenneth N. Lipstein, attorney for respondent.

PER CURIAM

Plaintiff Jennifer Llanes appeals the Law Division's order granting defendant Allstate New Jersey Insurance Company (Allstate) summary judgment on plaintiff's claim for personal injuries sustained in an auto accident. Having considered the parties' arguments in light of the record and applicable legal standards, we affirm.

Plaintiff was insured under a private passenger automobile insurance policy issued by Allstate, which included uninsured motorist (UM) coverage. In October 2011, plaintiff's vehicle was rear-ended by a vehicle driven by defendant Johnnie Moore, an uninsured driver. She was treated at the emergency room for complaints of pain in her neck and back and released. Two days later, she saw Dr. Ali Guy, a board-certified physiatrist, who treated her and prescribed physical therapy. Plaintiff continued treatment and physical therapy until February 2013, when she certified she "experienced financial difficulties" and was "forced" to end her treatment.

In October 2011, Dr. Guy ordered MRIs of plaintiff's cervical and lumbar spine. The MRIs revealed a disc herniation in the neck at C5-6 and disc bulges in the cervical and lumbar spine. He ordered electromyography (EMG) studies, which revealed radiculopathy at C5-6 and bilateral lumbar radiculopathy at L-5. Dr. Guy's November 11, 2011 report diagnosed a disc herniation at

C5-6, disc bulges, cervical and lumbar radiculopathy as noted and "traumatic myofascial pain syndrome." Most notably, the doctor's November 2011 report did not offer an opinion on the permanency of these diagnoses and, except for use of the word "traumatic," gave no opinion on the issue of causality.

In February 2013, plaintiff filed suit against the uninsured driver, and against Allstate based on her UM coverage. Allstate answered, but the uninsured driver did not answer and was defaulted. The discovery period ended on April 17, 2014. Mandatory arbitration was conducted in July, but Allstate filed a request for a de novo trial. Allstate then filed for summary judgment on July 17, 2014, alleging the limitation-on-lawsuit threshold was not satisfied.

Plaintiff opposed Allstate's summary judgment motion. She alleged she was experiencing "further and greater pain" caused by her new job as a surgical technician, and was re-examined by Dr. Guy. On July 29, 2014, plaintiff served a new report from Dr. Guy, dated July 11, 2014,<sup>1</sup> which for the first time gave the opinion plaintiff suffered a "permanent partial disability" that was

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<sup>1</sup> Although there was dispute about whether the report was served in July or in September 2014, shortly before the trial date, the motion judge treated the report as having been served on July 31, 2014.

causally related to the accident of October 10, 2011, although apparently he no longer diagnosed cervical radiculopathy.

Allstate's motion for summary judgment was granted on September 5, 2014, dismissing the case against it.<sup>2</sup> In a written opinion, the motion judge found that no certification of permanency was submitted within the statutory sixty days as required by N.J.S.A. 39:6A-8(a) and Dr. Guy's July 2014 report was not issued until after the discovery end date. Citing to Rule 4:17-7, which permits interrogatories to be amended twenty days prior to the end of the discovery period, the motion judge found that plaintiff did not show why the doctor's report could not have been obtained within sixty days or within the discovery period with due diligence. The court found plaintiff's complaints of pain arising from her new job duties did not constitute due diligence under the Rule. The court concluded that once plaintiff served Dr. Guy's report, Allstate's motion constituted an objection to the late certification as contemplated under Rule 4:17-7. Therefore, the court held that plaintiff was precluded from amending her interrogatories to include the late certification because

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<sup>2</sup> The litigation continued against defendant Moore. Plaintiff was awarded a judgment of \$84,275.03 against Moore in a proof hearing on March 19, 2015 where a different judge found that plaintiff satisfied the limitation-on-lawsuit threshold based on a permanent injury. The court made clear, however, that this finding did not apply to Allstate because it had been dismissed from the case.

plaintiff had not shown due diligence. The court found Allstate would be prejudiced in its defense of the case "at this late juncture" if the late filing were permitted. The court granted Allstate's motion for summary judgment because, without an expert opinion on permanency, plaintiff did not meet the limitation-on-lawsuit threshold.

Plaintiff appeals the order granting Allstate summary judgment. She contends the court erred by not permitting her to amend her interrogatories to include Dr. Guy's July 2014 report.

We review an order for summary judgment using the same standard that governs the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). We consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp., Inc. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)).

We first review the applicable legal principles that guide our analysis. In order to satisfy the limitation-on-lawsuit or "verbal threshold" of the Automobile Insurance Cost Reduction Act (AICRA), N.J.S.A. 39:6A-1.1 to -35, plaintiff must submit a physician's certified statement that "the automobile accident victim suffered from a statutorily enumerated injury." Davidson

v. Slater, 189 N.J. 166, 181 (2007) (citing N.J.S.A. 39:6A-8(a)). One type of qualifying injury is a "permanent injury<sup>3</sup> within a reasonable degree of medical probability . . . ." N.J.S.A. 39:6A-8(a). The doctor's certification must be based on "objective clinical evidence," N.J.S.A. 39:6A-8(a), meaning that 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)). The doctor's certification is to be served within sixty days from the defendant's answer or, if an extension is granted for good cause, within sixty days thereafter. N.J.S.A. 39:6A-8(a).

The physician's certification of permanency submitted to comply with N.J.S.A. 39:6A-8(a) does not establish prima facie evidence of a permanent injury either warranting a trial or precluding summary judgment. Rios v. Szivos, 354 N.J. Super. 578, 584-85 (App. Div. 2002). Its late submission is not an automatic ground for dismissal in light of Casinelli v. Manqlapus, 181 N.J. 354, 365 (2004) (holding that "tardy presentation of a physician certification [falls] under the broad umbrella of failure to make

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<sup>3</sup> An injury is considered as permanent "when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment." Davidson, supra, 189 N.J. at 189 (citing N.J.S.A. 39:6A-8(a)).

discovery, thus subject to the arsenal of remedies provided in our rules for such procedural errors."). In considering the remedy for such a violation,

the court should assess the facts, including the willfulness of the violation, the ability of plaintiff to produce the certification, the proximity of trial, and prejudice to the adversary, and apply the appropriate remedy.

[Casinelli, supra, 181 N.J. at 365.]

Dismissal is one of a range of remedies for non-compliance with the statute, "depending on the facts." Id. at 366.

Here, the court did not permit the late amendment of plaintiff's interrogatories to include Dr. Guy's report. Rule 4:17-7 addresses the amendment of interrogatories that are incomplete or inaccurate, providing that

amended answers shall be served not later than 20 days prior to the end of the discovery period . . . . Amendments may be allowed thereafter only if the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date. In the absence of said certification, the late amendment shall be disregarded by the court and adverse parties. Any challenge to the certification of due diligence will be deemed waived unless brought by way of motion on notice filed and served within 20 days after service of the amendment. Objections made thereafter shall not be entertained by the court.

[R. 4:17-7.]

The motion judge found plaintiff had not shown due diligence, thus barring the requested amendment.

The decision to admit or preclude documents based upon discovery violations is committed to the sound discretion of the trial court. Medford v. Duggan, 323 N.J. Super. 127, 133 (App. Div. 1999). "Its determination of these issues are entitled to deference in the absence of a mistaken exercise of discretion." Ibid. (citing Payton v. N.J. Turnpike Auth., 148 N.J. 524, 559 (1997)).

We discern no abuse of discretion in the court's decision to exclude the late report, and then to grant summary judgment dismissing plaintiff's complaint. Plaintiff acknowledged her lawsuit was subject to the limitation-on-lawsuit option, N.J.S.A. 39:6A-8(a), and that she had failed to provide a certification of permanency as required by N.J.S.A. 39:6A-8 in a timely manner. She did not request an extension to submit a certification. Although plaintiff contends her new job increased her symptoms, there was no evidence of a new injury, no new medical studies since 2011, and nothing in Dr. Guy's July 2014 report that connected the new job to her increased symptoms. Plaintiff did not explain why the doctor's diagnosis of permanency could not



have been made in 2011, or in April 2014 prior to the close of discovery, or prior to the arbitration in July 2014.

There was a three-year delay by plaintiff in submitting the physician's report that was not explained, and which prejudiced Allstate's ability to respond because it was received after discovery closed, after the arbitration was conducted and shortly before the October 2014 trial date. We agree that plaintiff did not demonstrate due diligence in obtaining the doctor's report on permanency and that the court did not abuse its discretion in prohibiting an amendment of the interrogatories on these facts.

We also find no error in treating Allstate's brief submitted in reply to plaintiff's opposition to summary judgment as an objection to plaintiff's request to amend the interrogatories, because plaintiff's opposition centered on the new report, which Allstate unquestionably opposed.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION