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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-0526-15T1

THOMAS NOVAK,

Plaintiff-Appellant,

v.

SOUTH PLAINFIELD BOARD OF  
EDUCATION, BOROUGH OF SOUTH  
PLAINFIELD and BARBARA HABEED,

Defendants/Third-Party  
Plaintiffs-Respondents,

v.

SODEXO,

Third-Party Defendant-  
Respondent.

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Argued January 11, 2017 – Decided February 24, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey,  
Law Division, Middlesex County, Docket No.  
L-7887-13.

Kenneth W. Thomas argued the cause for  
appellant (Lanza Law Firm, LLP, attorneys;  
Mr. Thomas, on the brief).

Walter F. Kawalec III argued the cause for respondents South Plainfield Board of Education, Borough of South Plainfield and Barbara Habeed (Marshall, Dennehey, Warner, Coleman & Goggin, attorneys; Mr. Kawalec, on the brief).

Respondent Sodexo has not filed a brief.

PER CURIAM

In this Title 59 matter, plaintiff Thomas Novak appeals from an order of summary judgment dismissing his complaint for failure to establish a permanent injury by objective medical evidence under N.J.S.A. 59:9-2d. Because our review of the record convinces us that defendants South Plainfield Board of Education, Borough of South Plainfield and Barbara Habeed were entitled to summary judgment as a matter of law, we affirm, substantially for the reasons expressed by Judge Carter in her opinion from the bench on August 21, 2015.

The essential facts are undisputed. Plaintiff was employed by Sodexo, a third-party contractor, on December 16, 2011 when he claims he suffered injuries to his back after he was struck by chairs falling off a rack while setting up for a Christmas concert at John F. Kennedy Elementary School. Plaintiff, however, had already sustained a work-related injury to his back from moving large landscaping rocks nearly two years earlier on January 22, 2010.

After a series of epidural injections failed to provide him significant relief following that first injury, plaintiff in October 2010 underwent a lumbar laminectomy and discectomy at levels L4-L5 and L5-S1 with decompression of the L4-L5 and S1 nerve roots. While the surgery was largely successful in relieving plaintiff's symptoms, he continued to experience pain radiating down his left leg, requiring another epidural injection in April 2011.

An MRI in May 2011 revealed annular bulging with thecal sac compression and bilateral foraminal stenosis at the L3-4 level; central subligamentous disc herniation with thecal sac compression at the L4-5 level; central subligamentous disc herniation with thecal sac compression at the L5-S1 level; and spinal stenosis at the L4-5 level, largely unchanged from an April 2010 MRI.

On December 7, 2011, nine days before the accident giving rise to this action, plaintiff underwent his fifth epidural injection for persistent back pain. An MRI performed on January 5, 2012, after the accident, documented the same findings noted in the May 2011 study with one exception. In addition to the central subligamentous disc herniation with thecal sac compression at the L5-S1 level, the radiologist noted a

"[s]econd larger area of disc herniation in conjunction with scarring in the right paracentral/lateral area."

An orthopedist plaintiff consulted on January 12, 2012, who reviewed the 2011 and 2012 MRI studies, concluded plaintiff had suffered an "[a]ggravation of preexisting lumbar disc herniations at L4-L5 and L5-S1 and lumbar disc surgery." He opined that plaintiff could "return to work in a sedentary capacity" and "follow up with pain management and physical therapy."

A spine surgeon plaintiff consulted the following month, noted plaintiff had "persistent increasing back and leg pain," and that he had been "symptomatic now for almost 2 years, but indicates that he is vastly worse since his event of December 16, 2011." The surgeon concluded plaintiff's "current event represents an aggravation of his pre-existing condition and his current complaints are causally related to his event of December 16, 2011." He recommended another laminectomy.

In connection with a related workers' compensation claim, two doctors for Sodexo examined plaintiff, one in 2012 and the other in 2013, and both concluded plaintiff had only suffered a contusion as a result of the second accident on December 16, 2011. A doctor who examined plaintiff on his behalf in that matter, diagnosed plaintiff as suffering from

post-traumatic sprain/strain injury to the lumbosacral spine with disc herniation L4-5, L5-S1 status post epidural injections and in the postoperative state for lumbar laminectomy and discectomy L4-5 on the left and L5-S1 on the right with postoperative MRI evidence of disc bulge at L3-4, disc herniation L4-5 and L5-S1 status post epidural injections with residuals of lumbosacral myositis and fibromyositis with loss of range of motion, sciatic neuralgia, left greater than right, and postoperative scarification.

She opined that "the accidents of January 22, 2010 and December 16, 2011 are the proximal cause of the complaints, physical findings, diagnosis and disability rating [66 2/3% of total]" she noted in her report.

Defendants made their summary judgment motion after the end of discovery. Upon review of the competent evidence in the motion record, viewed in the light most favorable to plaintiff, Judge Carter concluded there was nothing in the record that would allow plaintiff "to carry his burden of proof at trial to establish a permanent injury that's causally related to the subject accident, and sufficient to [vault] the damages threshold of the Tort Claims Act."

Specifically, the judge identified plaintiff's burden under N.J.S.A. 59:9-2d, the statute limiting awards for pain and suffering to cases involving permanent loss of a bodily function, permanent disfigurement or dismemberment, to prove an

objective permanent injury and permanent loss of a bodily function that is substantial. See Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324, 329 (2003). With regard to the first prong, the judge noted the requirement of Brooks v. Odom, 150 N.J. 395, 402-03 (1997), that plaintiff "'prove by objective medical evidence that the injury is permanent,'" relying on the Supreme Court's holding that "[t]emporary injuries, no matter how painful and debilitating, are not recoverable." Finally, the judge noted "'[t]he alleged permanent injury and substantial loss of bodily function must be proximately caused by the subject accident. And a plaintiff will risk dismissal on summary judgment if a defendant can show that no reasonable fact finder could conclude that the defendant's negligence caused plaintiff's alleged permanent injury.'" Davidson v. Slater, 189 N.J. 166, 188 (2007).

Applying those standards to the proofs adduced on the motion, Judge Carter concluded that the spine surgeon plaintiff consulted, while finding "an aggravation of a pre-existing disc herniation," failed to point "to the specifics of what [led] him to that conclusion beyond the plaintiff's subjective complaints of pain." Plaintiff's counsel had already been forced to concede in response to the court's questions during the colloquy that plaintiff's orthopedist had not expressed an opinion that

the aggravation he found was either permanent or related to the accident. Further, the judge found plaintiff's own expert failed "to distinguish permanent injuries caused by the plaintiff's accident of January 22, 2010 from those caused, or permanently aggravated, by the subject accident of December 16, 2011."

Having reviewed the "competent record," the court "was unable to find . . . objective medical evidence that the plaintiff sustained a permanent injury proximately caused by the subject accident." Because plaintiff could not prove permanent injury, the judge concluded she did not need to "address whether or not the plaintiff indeed suffered a substantial and permanent loss of a bodily function."


On appeal, plaintiff contends the court erred in dismissing his complaint on summary judgment, "as objective medical evidence supports a determination [he] sustained a permanent injury on December 16, 2011." We disagree. "The mere existence of a scintilla of evidence in support of the plaintiff's position" is insufficient to defeat summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 532 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477

U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214  
(1986)).

Because we agree that no rational factfinder viewing the competent evidential materials presented in the light most favorable to plaintiff could find he suffered a permanent injury causally related to the accident of December 16, 2011, see id. at 540, we affirm, substantially for the reasons expressed by Judge Carter in her cogent and comprehensive opinion from the bench on August 21, 2015.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION