

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2183-12T3

BULENT YAVUZ, SAMIYE
GULDEREN YAVUZ,

Plaintiffs-Appellants,

v.

JOHN J. DRURY, JR., WEINSTOCK
ENTERPRISES, L.L.C.,

Defendants-Respondents.

Argued January 14, 2014 – Decided May 1, 2014

Before Judges Espinosa and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Docket No.
L-10083-10.

Andrew J. Renda, Jr., argued the cause for
appellants (Renda & Voynick, attorneys;
John S. Voynick, Jr., of counsel and on
the brief; Michelle Joy Munsat, on the
brief).

Peter DeSalvo, Jr., argued the cause for
respondents (Soriano, Henkel, Biehl &
Matthews, attorneys; Mr. DeSalvo, on the
brief).

PER CURIAM

Following a trial in this automobile negligence action, a jury awarded plaintiff Bulent Yavuz \$30,000 and plaintiff Samiye Gulderen Yavuz \$80,000 in damages.¹ Both plaintiffs appeal, contending the trial judge erred in failing to charge on aggravation of a preexisting condition. As plaintiffs' contention lacks merit, we affirm the judgment memorializing the jury verdict and denying plaintiffs' motion for a new trial.

Defendants conceded liability and the matter was tried on the issue of damages only; both plaintiffs claimed they suffered physical injuries as a result of the accident. Bulent testified that the accident caused him to experience pain in his neck and back and have difficulty raising his left arm. He did not have any pain or problems with his neck, back or arm before the accident. Plaintiffs' medical expert witness, orthopedist Burgess Berlin, M.D., attributed Bulent's complaints to injuries sustained in the accident, which included a herniated disc in both his cervical and lumbar spines, and traumatically induced bursitis in his left shoulder.

Dr. Berlin acknowledged that before the accident Bulent had developed "osteophytes" on his cervical and lumbar spines, which

¹Plaintiffs, husband and wife, share the same last name. To avoid confusion, we refer to the husband as Bulent and the wife as Gulderen (during the trial she was referred to by her middle as opposed to her first name). We do not intend any disrespect by such informality.

are "boney projections" and a normal part of the aging process. Dr. Berlin also conceded that before the accident there were degenerative changes in Bulent's left shoulder. Although he testified that the injuries Bulent sustained in the accident were superimposed upon the osteophytes, Dr. Berlin did not testify that any preexisting condition was aggravated as a result of the accident.

Defendants' medical expert, orthopedist Edward Decter, M.D., testified Bulent sustained only soft tissue injuries in the accident. He also noted Bulent had preexisting osteophytes and degenerative changes along his spine, as well as arthritis and tendonitis in his left shoulder, but Dr. Decter did not testify that any of these preexisting conditions were made worse by the accident.

As for Gulderen, Dr. Berlin testified the accident caused her to suffer "multiple" herniated discs in her cervical spine, three herniated discs in her lumbar spine, crushed vertebrae in her thoracic spine, a fracture of the left shoulder blade, bleeding about the heart, joint effusion around the knee, and a concussion. Before the accident, Gulderen did not have any complaints of pain or disability in those areas of her body that were injured in the accident. Dr. Berlin acknowledged Gulderen

did have preexisting osteophytes along her spine, but he did not opine the accident aggravated any preexisting condition.

Dr. Decter conceded Gulderen fractured and permanently injured her left shoulder blade in the accident; otherwise, he opined all other injuries Gulderen sustained were soft tissue and temporary in nature. He also made note of the fact Gulderen had osteophytes along her spine "consistent with degenerative disc disease," which had formed before the accident. The extent of Dr. Decter's testimony on aggravation of Gulderen's preexisting conditions was as follows:

[Defense counsel]: So, with respect to the cervical, lumbar, left shoulder, left knee, and thoracic spine[,] you reviewed those MRI studies, within a reasonable degree of medical probability do you see any injuries that were causally related to this motor vehicle accident?

Dr. Decter: I think they're chronic, preexisting. There may have been some temporary exacerbation, that's certainly a real possibility. Her main injury was the fractured scapula, which I find is a permanent injury.

Following Dr. Decter's testimony, plaintiffs requested but the trial judge refused to charge the jury on Model Jury Charge (Civil), 8.11F, "Aggravation of the Preexisting Disability" (1997). Plaintiffs claim the trial judge committed error by refusing to deliver this charge. Having reviewed the entire

record, we conclude plaintiffs' contention is without sufficient merit to warrant extended discussion, Rule 2:11-3(e)(1)(E). We add the following comments.

While the record contains proof that both plaintiffs had asymptomatic, preexisting conditions, the medical proofs do not support a claim either plaintiff's preexisting condition was made worse by the accident. Neither medical expert witness testified that, within a reasonable degree of medical probability, the accident caused one or both plaintiffs to suffer an aggravation of a preexisting condition. When an expert provides an opinion about medical causation, his testimony "must be couched in terms of reasonable medical probability; opinions as to possibility are inadmissible." Eckert v. Rumsey Park Associates, 294 N.J. Super. 46, 50 (App. Div. 1996), certif. denied, 147 N.J. 579 (1997) (citing Johnesee v. Stop & Shop Cos., 174 N.J. Super. 426 (App. Div. 1980)). While we recognize it is not necessary for a medical expert to use the "'talismanic'" or "'magical words'" represented by the phrase "reasonable degree of medical certainty," Eckert, supra, 294 N.J. Super. at 51 (citing Aspiazu v. Orgera, 205 Conn. 623, 632 (1987)), nevertheless, a party must provide testimony that establishes the necessary medical causal relationship between a

preexisting condition and an accident before a court can charge aggravation of a preexisting condition.

Gulderen attempts to posit a medical foundation for her theory she suffered an aggravation of a preexisting condition in the above-cited testimony of Dr. Decter. However, the doctor merely stated there "may" have been or there was a "real possibility" there was an exacerbation of a preexisting condition. Dr. Decter's testimony is equivocal; it falls short of establishing there is a probable causal connection between Gulderen's preexisting condition and the accident. We take further note that when the court charged the jury that plaintiffs had the burden of proving their claims by a preponderance of the evidence, the court instructed, without objection from plaintiffs, that "proof of possibility as distinguished from probability is not enough." As there is no competent medical proof the accident aggravated any of the plaintiffs' preexisting conditions, the trial judge did not err when he declined to charge the jury with Model Jury Charge 8.11F.

Affirmed.

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


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