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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0854-21**

GLENN HUGHES,

Plaintiff-Appellant,

v.

JASON T. WORTHINGTON,

Defendant-Respondent.

Argued December 19, 2022 – Decided December 30, 2022

Before Judges Whipple, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-0535-19.

Frank N. DiMeo, Jr., argued the cause for appellant (Rosen Schafer & DiMeo, LLP, attorneys; Frank N. DiMeo, Jr., on the brief).

Michael B. Kelly argued the cause for respondent (Ronan, Tuzzio & Giannone, attorneys; Michael B. Kelly, of counsel and on the brief; Nicholas R. McClelland, on the brief).

PER CURIAM

Plaintiff Glenn Hughes appeals from the trial court's order dated October 22, 2021, dismissing his complaint with prejudice pursuant to Rule 4:37-2(b). Plaintiff's claim was subject to the Automobile Insurance Cost Reduction Act (AICRA), N.J.S.A. 39:6A-1.1 to -35. The trial court granted defendant Jason Worthington's motion for a directed verdict based on plaintiff's failure to present objective, credible medical evidence to support his claim he suffered a permanent injury. Based on our review of the record and the applicable legal principles, we affirm.

I.

Plaintiff filed a complaint seeking damages for personal injuries allegedly sustained as a result of an October 17, 2017 automobile accident during which defendant rear-ended plaintiff's vehicle. Because defendant stipulated liability, the only issue at trial was whether plaintiff's injuries were permanent and causally related to the accident. Plaintiff alleged as a result of the accident he had restricted range of motion in his neck and pain when turning his head.

Dr. Norman Stempler testified as an expert on behalf of plaintiff.¹ Dr. Stempler testified plaintiff lost range of motion in his neck as a result of the

¹ Dr. Stempler's de bene esse video deposition was played at trial.

accident. He further testified an MRI taken two months after the accident supported his diagnosis plaintiff suffered an aggravation of pre-existing degenerative disc disease. He explained the degenerative disc disease was "just there until something [happened] to activate [it]"

Significantly, however, on cross-examination, Dr. Stempler conceded the degenerative disc disease of the cervical spine pre-dated the accident, and he could not observe an aggravation of this pre-existing condition on plaintiff's MRI. He further admitted his opinion concerning the aggravation of degenerative disc disease was derived from plaintiff telling him he was asymptomatic before the accident, but that he experienced decreased range of motion in his neck following the accident. Dr. Stempler also acknowledged he could not determine if the findings on plaintiff's MRI were acute or chronic. Notably, Dr. Stempler agreed range of motion testing has a subjective component.

Defendant subsequently moved for a directed verdict, contending plaintiff failed to demonstrate—with objective, credible medical evidence—he suffered a "permanent injury" as a result of the accident. The trial court held, giving plaintiff the benefit of all reasonable inferences, no reasonable juror could find for plaintiff. The trial court noted Dr. Stempler formed his opinion based on

plaintiff's subjective complaints concerning decreased range of motion and lack of similar complaints prior to the accident. Therefore, the trial court determined Dr. Stempler improperly relied on subjective evidence. Relying on Agha v. Feiner, 198 N.J. 50 (2009), and Davidson v. Slater, 189 N.J. 166 (2007), the trial court concluded plaintiff failed to establish by objective, credible evidence, a nexus between his alleged injuries and the October 2017 accident as required by N.J.S.A. 39:6A-8(a).

On appeal, plaintiff contends the trial court erred in granting defendant's motion for a directed verdict because sufficient, objective medical evidence was presented to show he sustained a permanent injury. Plaintiff acknowledges Dr. Stempler conceded there was "nothing on [the] MRI that confirmed the aggravation of [plaintiff's] pre-existing disease" However, plaintiff asserts his subjective complaint—restricted range of motion—was sufficient to support Dr. Stempler's opinion there was a permanent injury. Plaintiff's arguments are unpersuasive.

II.

We review a trial court's grant of a motion for involuntary dismissal of a negligence claim pursuant to Rule 4:37-2(b) by applying the same standard as the trial court. ADS Assocs. Grp., Inc. v. Oritani Sav. Bank, 219 N.J. 496, 511

(2014). "A motion for involuntary dismissal is premised 'on the ground that upon the facts and upon the law the plaintiff has shown no right to relief.'" Id. at 510 (quoting R. 4:37-2(b)). "The 'motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor.'" Ibid. (quoting R. 4:37-2(b)). "If the court, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, finds that reasonable minds could differ, then the motion must be denied." Id. at 510-11 (citation and internal quotation marks omitted). "The . . . court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969).

In Agha, the Court noted, "[t]he 'limitation on lawsuit' or 'verbal threshold' of AICRA, N.J.S.A. 39:6A-8(a), is a cost-containment measure that provides lower premium payments in exchange for a limitation on the insured's right to sue for noneconomic damages." 198 N.J. at 60 (citing DiProspero v. Penn, 183 N.J. 477, 480-81 (2005)). The Agha Court further observed, "[t]he Act restricts suits for such damages unless the victim 'sustain[s] a bodily injury which results

in death; dismemberment; significant disfigurement or significant scarring; displaced fractures; loss of a fetus; or a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement." Ibid. (citing N.J.S.A. 39:6A-8(a)) (emphasis added). N.J.S.A. 39:6A-8(a) provides "[a]n injury shall be considered 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." Ibid. The Agha Court noted:

In order to vault the threshold, a physician must certify, under penalty of perjury, [N.J.S.A. 39:6A-8(a)], that "the automobile accident victim suffered from a statutorily enumerated injury." [Davidson, 189 N.J. at 181]. That opinion must be based on "objective clinical evidence," N.J.S.A. 39:6A-8(a), a standard that we have held is the equivalent of the "credible, objective medical evidence" standard described in Oswin v. Shaw, 129 N.J. 290, 314 (1992). DiProspero, 183 N.J. at 495. Under that standard, which is a critical element of the cost-containment goals of AICRA, the necessary objective evidence must be "derived from accepted diagnostic tests and cannot be 'dependent entirely upon subjective patient response.'" Davidson, 189 N.J. at 181 (quoting N.J.S.A. 39:6A-8(a)). Thus, subjective tests, such as those that evaluate range of motion, will not suffice. See id. at 190 ("All other diagnostic methods performed on plaintiff, including range of motion tests . . . , are not on the list [of accepted diagnostic procedures] or are otherwise expressly declared to be invalid diagnostic methods." (citing N.J.S.A. 39:6A-8(a); N.J.A.C. 11:3-4.5)); see also Polk v. Daconceicao, 268 N.J. Super. 568, 573 (App. Div. 1993) ("[M]easurements of limitation of motion alone

are insufficient to overcome the verbal threshold imposed by [N.J.S.A. 39:6A-8(a)].").

[198 N.J. at 60-61.]

Although subjective complaints of pain may suffice if "verified by physical examination and observation . . . [of] objectively demonstrable conditions such as 'swelling, discoloration, and spasm' a physician's 'observations' of a patient's subjective responses [cannot be transmuted] into objective clinical evidence." Id. at 61 n.5 (quoting Oswin, 129 N.J. at 320). Again, "[s]ubjective tests, such as those that evaluate range of motion, will not suffice." Id. at 60.

Guided by these standards and applying the standard of review, we are satisfied the trial court properly granted the directed verdict. Here, in order to avoid a directed verdict, plaintiff was required to prove through expert testimony there was objective clinical evidence his injuries were permanent and causally related to the automobile accident. Dr. Stempler's testimony concerning permanency was based solely on plaintiff's subjective claims concerning diminished range of motion and was not based on the requisite objective proofs required under Agha. Dr. Stempler opined based on plaintiff's current complaints—which purportedly did not exist prior to the accident—he had sustained a permanent injury. Dr. Stempler acknowledged he was unable to

determine if the degenerative disc disease of the cervical spine observed on the MRI was acute or chronic. Accordingly, his testimony was not based on credible, objective evidence obtained from accepted diagnostic tests, and is, therefore, insufficient to vault the threshold under N.J.S.A. 39:6A-8(a). Davidson, 189 N.J. at 181. Accordingly, we conclude the trial court properly granted the motion for a directed verdict.

Affirmed.

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



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