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PROCEDURAL HISTORY¹

Plaintiff filed her Complaint on April 9, 2002. (Pa28)

Defendants Robert Kaminski, Vault and ABC Corp. were subsequently dismissed and are not part of this appeal.

Defendant-Respondents Farah Alibrahim and Fadwa Ojyli moved for summary judgment on or around November 7, 2003. (Pa17 to Pa128)

Oral argument before the Honorable Jamie S. Perri, J.S.C., was had on December 5, 2003 and a decision granting defendant-respondents' motion and affirming an arbitration award was rendered on the even date from the bench. (See hearing transcript enclosed herewith; Order granting summary judgment at Pa7; and, Order affirming arbitration award at Pa9.)

The Court's findings of fact and conclusions of law are set forth at T21:5 to T33:19.

Plaintiff filed a notice of appeal on March 9, 2004. (Pa2) No cross-appeal has been filed.

¹ There is only one volume of transcript being produced for this appeal which is of the December 5, 2003 oral argument of defendant-respondents' motion for summary judgment.

STATEMENT OF FACTS

This action concerns an automobile accident that transpired on October 14, 2000. Plaintiff Nancy Gisleson was insured at the time with a verbal threshold policy by Newark Insurance Company, Policy No. 415561007701. (See the Parties Statements of Disputed and Undisputed Facts at Pa19, ¶¶ 1-3, and Pa129, ¶ 1.)

Plaintiff received extensive medical treatment for her injuries. *Inter alia*, Plaintiff underwent an MRI on February 19, 2001, that confirmed a herniated disc at C6-7 which is "causing some mild ventral impression upon the right anterior aspect of the central cord" along with some "mild neural foraminal narrowing seen at C6-7". (See the Parties Statements of Disputed and Undisputed Facts at Pa129, ¶ 2, and Pa157 to Pa158.)

Plaintiff also underwent a Nerve Conduction Study on the upper extremities on March 5, 2001 that revealed bilateral carpal tunnel syndrome with the right more advanced than the left. (See the Parties Statements of Disputed and Undisputed Facts at Pa19, ¶ 7, and Pa129, ¶ 1.)

Dr. Goione issued plaintiff a Certificate of Permanency, pursuant to N.J.S.A. 39:6A-8, regarding plaintiff's injuries sustained in the accident. (Pa19-26, ¶ 4; Pa48; Pa129, ¶ 1;

Pa157 to Pa158) Dr. Goione clarified in a subsequent supplemental report that all of plaintiff's injuries were as a result of the before mentioned car accident. (Pa157 to Pa158)

Plaintiff filed suit April 9, 2002. (Pa28) In addition to the foregoing, the detailed injuries that plaintiff alleges to have sustained as a result of the before mentioned auto accident are set forth at Pa20, ¶4, which recites plaintiff's answer to an Interrogatory. Plaintiff suffers from, *inter alia*, neck pain and stiffness, shoulder and back pain, ringing in her ears, numbness of her tongue, fatigue and sleep disturbance. (See the Parties Statements of Disputed and Undisputed Facts at Pa19-26, ¶ 4, and Pa129 to Pa146, ¶ 1; Pa142-146, ¶¶ 2, 3 and 9) Since the accident, plaintiff must get out of bed in the middle of every night to shake-off the numbness in her arms and hands that she experiences whenever she lays down to sleep. (Pa142-146, ¶ 9)

Since the accident, plaintiff can no longer enjoy the swimming and cardio-kickboxing that she enjoyed on a weekly basis because it causes her severe pain in her neck, upper back and shoulder area. (Pa142-146, ¶¶ 4-8) Lifting her arms above her head for any kind of activity, including the swimming, kickboxing and household chores, is painful to the extent that she no longer participates in any kind of exercise and went from cleaning her home as a single mother for her and

her six children once per week to once per month. (Pa142-146, ¶¶ 4-8)

As to plaintiff's prior history of injuries, she was involved in a car accident in or around 1999 with no injuries having been sustained. (See the Parties Statements of Disputed and Undisputed Facts at Pa19-26, ¶ 10, and Pa129 to Pa146, ¶ 1) She also had two previous slip-and-falls, one in 1987 and one in 1998, where she sustained only minor injuries to her low back, right shoulder and wrist. (See the Parties Statements of Disputed and Undisputed Facts at Pa19-26, ¶ 13, and Pa129 to Pa146, ¶ 1.)

Plaintiff inadvertently said to one Arthur Mark, M.D., that she was involved in a second car accident in or around 1999 where she was seriously injured, but the accident plaintiff was speaking of was the one at issue in this case that transpired in 2000. (See the Parties Statements of Disputed and Undisputed Facts at Pa19-26, ¶ 11, and Pa129 to Pa146, ¶ 3; Pa142 to Pa146, at ¶13.) Defendant-respondents have exploited that simple mistake by plaintiff throughout this matter to mean that plaintiff had prior notable injuries from prior auto accidents. That is simply untrue.

Dr. Goione issued a supplemental report to clarify that the injuries he found plaintiff to have sustained were permanent in nature and were the result of the car accident at

issue in this case and not a previous injury. (Pa157 to Pa158)
The trial court accepted Dr. Goione's before mentioned supplemental report and accepted as true plaintiff's statements that she had not been injured during her prior accidents. [T27:24 to 28:9]

The trial court ultimately entered summary judgment against plaintiff, finding that she submitted sufficient objective medical evidence that she was significantly injured, but not enough evidence that her injuries have had a significant impact upon her life. [T31:4 to 33:21]

Plaintiff appeals this judgment. No cross-appeal has been filed.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED BY FINDING THAT PLAINTIFF'S PHYSICAL LIMITATIONS AS A RESULT OF HER INJURIES ARE NOT SIGNIFICANTLY AFFECTING HER LIFESTYLE, AND THUS THAT PLAINTIFF HAD NOT MET ONE OF THE PRONGS FOR BREACHING THE VERBAL THRESHOLD

As stated above, plaintiff suffered from the accident a herniated disc at C6-C7 and a bulging disc at C5-C6 that was causing an impression on her spinal cord. This evidence was undisputed between the parties and the trial court accepted it as true for purposes of the summary judgment motion. [See the Parties Statements of Disputed and Undisputed Facts at Pa19, ¶

6, and Pa129, ¶ 2; and, Pa48; Pa53; Pa158; T21:11-23; T26:5-9; and, T31:4-10]

Plaintiff also submitted evidence that to this day she is still experiencing significant pain and physical limitations as a result of the injuries. (See the Parties Statements of Disputed and Undisputed Facts at Pa19-26, ¶ 4, and Pa129 to Pa146, ¶ 1; Pa142-146, ¶¶ 2-11.) The trial court accepted as sufficient the Affidavit of Permanency submitted by plaintiff.

[T26:25 to 27:6]

The trial court erred by failing to give due weight, however, to plaintiff's diminished ability to do household chores coupled with her significant sleep disturbance and inability to lift her arms above her head or to exercise. The trial court in its findings of fact and conclusions of law [T21:5 to 33:21] found that plaintiff's limitations were insufficient to constitute significant impacts upon her life.

[T31:4 to 33:21]

A. Household Chores/Exercise.

It is well-established that an example "of serious impact on a lifestyle could be the inability to do household chores." Shorter v. Leach, 277 N.J. Super. 617, 622 (Law Div. 1994). Shorter for that quote has been cited by the Appellate Division on multiple occasions with approval. See, e.g.,

Natale v. Kisling, 336 N.J. Super. 198, 203 (App. Div. 2001), and Cineas vs. Mammone, 270 N.J. Super. 200 (App. Div. 1994).

Inability to do household chores is not *per se* sufficient to breach the verbal threshold. In Natale, *supra*, the court said that it will be sufficient, however, if it is coupled with other limiting facts on the victim's lifestyle. Natale, *surpa*, at 203. In Natale, the court found that the verbal threshold was breached in that the victim also alleged to have a diminished sex life. Id. Here, the plaintiff is a single parent with all the limitations that status implies. Clearly her inability to do household chores has a greater impact upon her life than it would have upon a married couple because plaintiff cannot rely upon her spouse for a contribution.

Likewise, in Cineas, *supra*, the victim alleged as a result of the accident to have a diminished sex life along with a diminished ability to do household chores and to assist his wife with same. Cineas, *supra*, at 211. Based upon those facts, the Appellate Division held that, "[I]t appears that the accident has made a significant impact on plaintiff's life and, as we documented earlier, plaintiff has satisfied the requirements of the verbal threshold statute under *Oswin* as it pertains to objective evidence of limitation of motion." Id. at 212.

The court is also referred to Cavanaugh vs. Morris, 273 N.J. Super. 38 (App. Div. 1994). There, it was held that the verbal threshold had been met where the victim suffered from blurred vision, severe headaches, shoulder and leg pain, and numbness during two and one-half years following accident, continued to have chronic pain in knee, hip, back and neck nearly three years after accident, and that injury had continuing adverse effect on her sex life. Id. at 41-42.

B. Significant Trouble Sleeping.

Although in most of the caselaws referred to in Point I(A), *surpa*, the plaintiff had a diminished sex life coupled with an inability to do household chores, the plaintiff here has a diminished ability to do household chores coupled with an inability to sleep through the night. We fail to see how being able to sleep through the night is less significant than having a healthy sex life. Plaintiff provided that as a result of the accident she now must get out of bed in the middle of **every night** to shake-off the numbness in her arms and hands that she experiences whenever she lays down to sleep. (Pa142-146, ¶ 9)

The trial court discounted plaintiff's sleep disturbance because the court found that plaintiff should simply medicate herself for it. [T33:1-8]

The subjective complaints about difficulty sleeping or that sort of thing, I don't see any indication that she has had to resort to any kind of medication or other advanced treatment in order to address that issue. Obviously, it's something that she is dealing with and it does not alter her life to the extent that she feels compelled to go out and do something about it.

[T33:1-8]

There is no authority in the State of New Jersey for the position taken by the trial judge to the effect that whether one drugs them self is part of the criteria for determining whether there is a "significant impact".

POINT II

THE TRIAL COURT ERRED BY REQUIRING PLAINTIFF TO PROVE A SIGNIFICANT IMPACT (NOT RAISED BELOW)

The trial court entered summary judgment against plaintiff because it found that plaintiff failed to submit enough evidence that her injuries have had a significant impact upon her life. [T31:4 to 33:21]

Based upon two recent opinions from this Court it appears significant impact no longer needs to be shown in order to breach the limitation on lawsuit option since the enactment of the Automobile Insurance Cost Reduction Act (AICRA), N.J.S.A. 39:6A-8(a), in 1998.

The Court made clear in Serrano vs. Serrano, 367 N.J. Super. 450 (App. Div. 2004), that it does not endorse an extreme position where absolutely all soft tissue injuries are sufficient to overcome the limitation on lawsuit option, but that it also does not endorse the opposite extreme position where a significant impact is mandatory in order to overcome that limitation. The Court said in detail:

Plaintiff and ATLA NJ argue that any permanent soft tissue injury, no matter how insignificant, satisfies the verbal threshold so long as there is medical proof to a reasonable medical certainty that "the body part or organ or both have not healed to function normally and will not heal to function normally with further medical treatment." Defendants, on the other hand, assert that even though a plaintiff suffers serious and permanent soft tissue injury, the AICRA threshold is not penetrated unless there is proof that the injury has a serious impact on lifestyle.

Although we do not endorse either of these extreme positions, they are nevertheless indicative of the issue presently before the Supreme Court. We can clearly perceive circumstances where a person sustains a soft tissue injury, which, though permanent, is not at all serious. For example, a soft tissue injury to the neck or back can result in morning stiffness, which then dissipates upon movement. Likewise, we can envision serious soft tissue injuries such as herniated discs or a tear of a medial meniscus, which result in pain but do not seriously impact life because the affected person has a sedentary lifestyle and endures pain better than the average person.

Id. at 459 (Emp. Supp.).

Therefore, although the Court did not hold that any and all soft tissue injuries are sufficient to overcome the limitation on lawsuit option, it recognized that injuries such as herniated disc, which is the exact injury sustained by the plaintiff herein, is indeed sufficient. Id.

The Court reaffirmed that holding in Bennett vs. Lugo, _____ N.J. Super. _____, 2004 WL 883983 (App. Div. 2004). There, the Court clarified that the new criteria for overcoming the limitation on lawsuit option was whether there is a serious soft tissue injury that is permanent in nature. The Court also held that, although not mandatory, proof of a significant impact will "bolster" the position that the limitation has been overcome.

This panel has recently adopted a formulation requiring proof of a soft tissue injury that is both permanent and serious. Serrano v. Serrano, 367 N.J. Super. 450, 460-61, 843 A.2d 358 (App.Div.2004) ... We observed that proof of serious life impact could be used to prove that a soft tissue injury is serious. Id. at 461, 843 A.2d 358 ...

We rest our decision on the approach we set forth in Serrano. As we have stated, applying the Brill standard, if a jury finds that plaintiff's disc herniation has been caused by the current accident, the jury can likewise reasonably find that the injury is serious and permanent. See id. at 459, 843 A.2d 358 (mentioning a herniated disc as an example of a serious and permanent injury). Such a conclusion is bolstered by plaintiff's serious life impact evidence, if believed by the

jury, that he is unable to engage in his usual form of employment because of his injury. Id. at 461, 843 A.2d 358.

Although not critical to our decision, we note in passing that plaintiff's life impact evidence (alleged inability to engage in his usual form of employment) is sufficient to survive summary judgment with respect to serious life impact as a separate prong under the James and Rios approach.

Id. at 477 (Emp. Supp.).

Accordingly, under the new standard for overcoming the limitation on lawsuit option set forth in Serrano and Bennett, *supra*, there was no need for the instant plaintiff, who suffered a herniated disc, to prove that the injuries caused a significant impact upon her life. This position is notwithstanding the fact, as argued hereinabove in Point I, that plaintiff has suffered such a significant impact in the form of inability to sleep through the night, diminished ability to do household chores and the like.

CONCLUSION

Plaintiff is a single mother with six (6) children who has sustained serious permanent personal injuries in the form of a herniated cervical disc whose life is being significantly impacted as a result. It is respectfully submitted she should be given her day in court and the trial court's order of

summary judgment should be reversed and this matter be remanded for trial on the merits.

LAW OFFICE OF HOWARD Z. BUCKNER, ESQ.

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Dated: