

Berta Abreu Flores v. N. Hudson Reg'l Fire &

Superior Court of New Jersey, Appellate Division

October 16, 2023, Argued; October 27, 2023, Decided

DOCKET NO. A-0009-22

Reporter

2023 N.J. Super. Unpub. LEXIS 1928 *

BERTA ABREU FLORES, Plaintiff-Appellant, v. NORTH HUDSON REGIONAL FIRE AND RESCUE, FERNANDO RODRIGUEZ, and ROMAN LEON, Defendants-Respondents.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

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Prior History: [*1] On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-4270-19.

Counsel: Scott M. McPherson argued the cause for appellant (Escandon, Fernicola, Anderson, Covelli & McPherson, attorneys; Robert M. Anderson, of counsel; Scott M. McPherson, on the briefs).

Philip W. Lamparello argued the cause for respondents (Chasan Lamparello Mallon & Capuzzo, PC, attorneys; Philip W. Lamparello, of counsel and on the brief; Drew D. Krause, on the brief).

Judges: Before Judges Sabatino and Vinci.

Opinion

PER CURIAM

Plaintiff was injured when a driverless fire truck suddenly crashed into her office building. She brought suit against the fire department and two of its employees under the Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 to 14:4. The trial court granted summary judgment dismissing her claims for pain and suffering, upon finding that her injuries did not satisfy the requirements of substantiality and permanency of the Act's verbal threshold, N.J.S.A. 59:9-2(d). Plaintiff appeals the dismissal, arguing the medical evidence

reflects genuine material issues of fact concerning the severity of her injuries and her ability to vault the statutory threshold.

Having reviewed the summary judgment record de novo, we affirm in part and reverse in part. Specifically, [*2] we affirm the trial court's ruling that plaintiff has not surmounted the threshold with respect to her claims of a shoulder injury and hearing loss. However, we reverse and remand the case concerning plaintiff's claims of an ongoing loss of balance, a condition that a jury could reasonably find to be substantial and permanent under the statute.

I.

We describe the facts of record in a light most favorable to plaintiff as the party opposing summary judgment. *Brill v. Guardian Life Ins. Co. of Am.*, 142 N.J. 520, 540, 666 A.2d 146 (1995); *R.* 4:46-1.

On March 29, 2018, a fire engine owned by defendant North Hudson Regional Fire and Rescue accidentally shifted into drive during a training exercise at a fire station in Union City. Driverless, the fire engine crossed the road and struck the front of a residence opposite the firehouse. The impact damaged the building's support columns. Plaintiff Berta Abreu Flores, a sixty-five-year-old woman who had been working on the first floor of the building, was injured by the collision.

At the time of the incident, plaintiff operated a tax preparation business out of the first floor of the residence. She had arrived at her office around 8:30 a.m. that morning and was working at her desk that faced the front of the building. Plaintiff was speaking [*3] with one of her employees, facing toward the employee and away from the front of the building, when they heard "a loud bang" that plaintiff thought "was a bomb." When the employee saw the wall was coming down, she yanked plaintiff from her chair by her right arm.

After being pulled from her desk, plaintiff immediately began to have pain on the left side of her head. She

noticed fragments of glass in her hair and a lump on her head. She was taken by responding EMS personnel to a local emergency room, where she reported pain in her left side, head, and shoulder, and dizziness. She was released that same day from the hospital.

Plaintiff continued to experience pain in the weeks following the accident. However, she managed to continue working for the next two-and-a-half weeks until the end of the tax season. She has not resumed working since that time.

About four months after the accident, plaintiff went to an audiologist with complaints of hearing loss, dizziness, nasal congestion, and difficulty maintaining her balance. Following a series of visits and tests, the audiologist diagnosed plaintiff with decreased hearing in both ears and injury to her brain stem, which would have to be treated [*4] indefinitely. He further diagnosed plaintiff with a loss of balance due to the "gravity distortion that is present in the inner ears twenty-four hours a day." The audiologist attributed the hearing deficits and loss of balance to the March 2018 incident. The doctor further noted that plaintiff had a fall a few months after the accident in June 2018, which he opined was injury-related and not age-related.

The audiologist prescribed the drug Lasix, which gave plaintiff some improvement. However, in April 2022, the doctor discontinued the Lasix because of the drug's side effects on plaintiff's kidneys. After that, plaintiff's loss of balance worsened. In addition, plaintiff's hearing problems persisted to some extent, although she did not obtain hearing aids.

Plaintiff also sustained in the accident an injury to her right shoulder. She was treated by an orthopedist, who diagnosed her with a tear of the supraspinatus tendon. The treating orthopedist similarly attributed these injuries to the subject accident.

After physical therapy failed to resolve her shoulder symptoms, plaintiff underwent an arthroscopic rotator cuff repair in March 2019. According to an orthopedist who conducted a further [*5] evaluation in November 2020, plaintiff continued to have, post-surgery, about a ten percent loss of full function in her right shoulder.

Plaintiff filed a complaint in the Law Division in October 2019 against the fire department and two of its employees under the TCA. She alleged defendants were negligent in causing the accident, although the issues of negligence and liability are not before us.

During the discovery period, plaintiff was examined by medical experts retained by the defense. The defense audiologist, who examined her in October 2020, diagnosed her with left sensorineural hearing loss and left labyrinthine dysfunction. The expert also noted plaintiff's imbalance issues, but he added that she reported feeling improvement when she took the prescribed Lasix. In addition, a defense orthopedist examined plaintiff in March 2021. That orthopedist opined that plaintiff's right shoulder injury was not causally related to the March 2018 accident, and, in any event, had been "objectively resolved" by the surgery.

Plaintiff was deposed in April 2021, at which time she stated that she could not hear very well out of her left ear, but acknowledged that her hearing had improved through [*6] treatment. She stated that she did not use hearing aids, noting that she could hear sufficiently in normal conversation if she paid "a lot of attention" to a person speaking with her. She acknowledged that if she took her Lasix medication she was able to control her balance issues.

Following discovery, defendants moved for summary judgment to dismiss plaintiff's claims of pain and suffering. Defendants argued plaintiff had not presented triable issues that her post-accident medical problems were substantial and permanent, as required by N.J.S.A. 59:9-2(d).

The motion judge was furnished with the pertinent medical reports. In addition, plaintiff submitted a certification dated June 14, 2022, in which she updated her medical status. Her certification advised that, due to underlying kidney disease, her primary care physician and audiologist had both advised her to discontinue her Lasix medication. As a result, plaintiff attested that her balance and hearing problems have become more prominent. In particular, plaintiff noted she is losing her balance at least twice each day on average and had recently fallen.

After oral argument, the motion judge issued a written decision granting summary judgment to defendants [*7] under N.J.S.A. 59:9-2(d). Among other things, the judge concluded "[t]he medical testimony provided by plaintiff's doctor and defendants' medical expert does not show whether the damage to her hearing loss is substantial." In that regard, the judge observed that the record showed plaintiff had returned to work and finished the tax season after the accident, and "does not require a hearing aid or listening device and she is still able to converse with others." Regarding plaintiff's right

shoulder, the motion judge found that plaintiff "ha[d] not shown by *objective medical evidence* that the injuries resulted in a loss of bodily function that is substantial," as compared with the precedent cases. The judge noted that plaintiff had "present[ed] subjective complaints of pain/discomfort when sleeping or lifting items," but had not provided "citations to objective medical evidence connecting her injuries to substantial limitations on her life." The judge did not expressly comment on plaintiff's imbalance problems, nor refer to the effects of plaintiff's recent discontinuation of Lasix.

On this appeal, plaintiff argues the motion judge erred in the application of N.J.S.A. 59:9-2(d). Plaintiff submits the record presents genuine [*8] issues of material fact that her injuries resulting from the accident are substantial and permanent.

II.

The applicable law governing the issues on appeal is well established. Tort claims made against public entities and public employees in New Jersey are subject to the conditions and limitations of the TCA.

The key provision of the Act here, N.J.S.A. 59:9-2(d), known as the TCA verbal threshold, imposes monetary and substantiality thresholds that must be surmounted by a plaintiff when an award is "for pain and suffering resulting from any injury." The non-monetary component of the threshold requires a TCA claimant to prove a "permanent loss of a bodily function, permanent disfigurement or dismemberment," N.J.S.A. 59:9-2(d). Our case law has construed that provision to require the claimant suffer an "objective" permanent injury or disfigurement that is "substantial." *Toto v. Ensuar*, 196 N.J. 134, 145, 952 A.2d 463 (2008); *Rocco v. N.J. Transit Rail Operations*, 330 N.J. Super. 320, 333-34, 749 A.2d 868 (App. Div. 2000).

In *Brooks v. Odom*, 150 N.J. 395, 401-03, 696 A.2d 619 (1997), the Supreme Court established a two-pronged standard for evaluating whether a plaintiff's injuries constitute a "permanent loss of a bodily function." This standard requires TCA plaintiffs to prove: (1) objective medical evidence of a permanent injury; and (2) a permanent loss of a bodily function that is substantial. *Id.* at 402-03, 406.

Further, in *Gilhooley v. Cnty. of Union*, 164 N.J. 533, 542, 753 A.2d 1137 (2000), the Court explained [*9] that the threshold is met when a plaintiff suffers "permanent injury resulting in a permanent loss of normal bodily function even if modern medicine can

supply replacement parts to mimic the natural function."

The Court elaborated further on these principles in *Kahrar v. Borough of Wallington*, 171 N.J. 3, 16, 791 A.2d 197 (2002), in holding that plaintiff's injury requiring surgery and still sustaining substantial impairment "reflect[ed] a comparable degree of impairment to the injury in *Gilhooley*."

In reviewing these summary judgment rulings under N.J.S.A. 59:9-2(d) on appeal, we apply the same statutory principles of the TCA. And, like the trial court, we must consider the record in a light most favorable to the plaintiff as the non-moving party. *Brill*, 142 N.J. at 540. Because we are provided with the same record as the motion judge, we review the court's determination de novo. *Branch v. Cream-O-Land Dairy*, 244 N.J. 567, 582, 243 A.3d 633 (2021).

Here, viewing the record in a light most favorable to plaintiff, we conclude the motion judge correctly determined that plaintiff's shoulder injury and hearing loss claims do not vault the verbal threshold. The judge fairly concluded from the medical evidence that plaintiff's shoulder injury has been effectively resolved through surgery. The ten percent estimated residual limitation on her shoulder functions is not sufficiently [*10] "substantial" to qualify under the statute. *Cf. Kahrar*, 171 N.J. at 16 (in which, by comparison, a forty percent permanent orthopedic limitation was deemed substantial enough to present a triable issue). Plaintiff has not presented sufficient evidence that her post-surgery shoulder condition has substantially restricted her daily life activities.

Although it is a closer question, we likewise concur with the trial court that plaintiff's hearing loss claims fail to vault the threshold. We recognize that the expert audiologists for both parties have detected through testing a diminution of plaintiff's hearing, more prominent in her left ear. However, none of those experts has expressly stated that the numerical values identified in the tests, as measured in "cycles," are of a severity that rises to a substantial limitation on plaintiff's daily life activities. Most importantly, plaintiff herself has not deemed her hearing problems severe enough to obtain the aid of hearing devices. She admits she is able, with attentiveness, to engage in normal conversation with others.

Although we agree with plaintiff that a loss of any of the five senses can at times qualify as a compensable injury under N.J.S.A. 59:9-2(d), that is not a per [*11] se principle. As plaintiff's counsel acknowledged at oral

argument before us, the sensory loss must be shown to be sufficiently substantial to vault the threshold. In the present case, plaintiff has not shown her hearing loss is so acute as to establish that requisite substantiality.

That said, we reach a different conclusion with respect to plaintiff's ongoing deficits of balance. Her post-deposition certification, which was justifiably submitted after her doctors discontinued her Lasix prescription for uncontested medical reasons, attests to how she has suffered significant problems with her balance, as often as twice per day.¹ The certification was not mentioned in the judge's written decision. Nor was the impact of the cessation of Lasix.

Given the present circumstances, we conclude that plaintiff's frequent and persistent loss of balance post-Lasix presents a genuine issue of material fact under N.J.S.A. 59:9-2(d). We therefore reverse summary judgment in that respect. At trial, the jury verdict form should contain a specific inquiry concerning the loss of balance. If that loss is found by the jury to surmount the threshold, then plaintiff's other injuries caused by the accident can also be compensated. [*12] See *Gerber v. Springfield Bd. of Educ.*, 328 N.J. Super. 24, 35, 744 A.2d 670 (App. Div. 2020).

Affirmed in part and reversed in part. We do not retain jurisdiction.

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¹ The certification also reports a reduction of plaintiff's hearing after the Lasix was halted. However, the focus of the expert medical reports is that the Lasix had been prescribed predominantly to address plaintiff's loss of balance. Moreover, for the reasons we have noted above, plaintiff's failure to make use of hearing aids undermines her claim of a substantial hearing impairment.