LINDA B. BREHME

Plaintiff/Appellant/Petitioner

vs.

THOMAS IRWIN; NEW JERSEY MANUFACTURERS INSURANCE COMPANY; JOHN DOES 1-5; ABC CORPORATIONS 1-5,

Defendants/Respondents

SUPREME COURT OF NEW JERSEY

Docket No.: 089025

Civil Action

BRIEF IN OPPOSITION TO PETITION FOR CERTIFICATION

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

Docket No.: A-3760-21

Sat Below:
Hon. Mary Whipple, P.J.A.D.
Hon. Jessica Mayer, J.A.D.
Hon. Catherine Enright, J.A.D.

BRIEF IN OPPOSITION TO PLAINTIFF'S PETITION FOR CERTIFICATION

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PROCEDURAL HISTORY

This matter arises out of a motor vehicle accident that occurred on December 16, 2016 involving the plaintiff, Linda Brehme, and the defendant, Thomas Irwin, now deceased.

The plaintiff filed a lawsuit alleging personal injuries as a result of the accident. (Pa1- Pa4) The matter was assigned to the Honorable Robert C. Wilson on June 20, 2022 for trial. On June 20, 2022, the trial court heard oral argument on Motions In Limine dealing with the issue of future medical expenses. (Pa39-Pa52) (1T at 52) The Court barred the claim for future medical expenses. (1T52:3-53-7) As stated in plaintiff's appellate brief, the matter was tried before a jury beginning on June 20, 2022 and ultimately concluding on June 28, 2022. The jury awarded damages in the amount of $225,000 for pain and suffering and lost wages of $50,000.00. On July 7, 2022, the Court entered an Order for Judgement. (Pa5 to Pa6) A Warrant to Satisfy Judgment was entered on August 8, 2022. (Pa84)

Plaintiff filed an Appeal believing that the trial court erred in barring Plaintiff, Linda Brehme's, claim for future medical expenses. On December 27, 2023, the Appellate Court dismissed the plaintiff's appeal as moot since the plaintiff accepted the full amount of the July 7, 2022 judgment. Plaintiff now seeks to review the final judgment of the Appellate Division entered on December 27, 2023.

LEGAL ARGUMENT

POINT I

PLAINTIFF'S REQUEST TO APPEAL THE FINAL JUDGMENT OF THE APPELLANT DIVISION SHOULD BE DENIED SINCE THE COURT CORRECTLY DISMISSED THE APPEAL AS MOOT

The Appellate Division correctly decided that the plaintiff's appeal was moot. In an August 3, 2022 letter the plaintiff acknowledged that the judgment had been satisfied. Plaintiff is not entitled to the relief sought in this appeal since she accepted full payment of the Judgment and a Warrant to Satisfy Judgment was filed. (Pa84). The plaintiff is asking the Court to keep the jury verdict in place and award additional compensation based on a trial court ruling. As previously argued below, should the court agree with the plaintiff's argument, it is defendant's position that the entire verdict must be vacated and the case retried in its entirety. This cannot be done piecemeal. Further, if the court reverses the Appellate court and trial court and remands the matter for a new trial, all monies which have been paid to plaintiff must be returned.

Plaintiff argues in her brief that she is within their rights to file an appeal even though she filed the Warrant to Satisfy Judgment. In support of this position, they cite to the cases of Guarantee Ins. Co. v. Saltman, 217 N.J. Super 604 (App. Div. 1987), 526 A.2d 731 and Adolph Gottscho, Inc., v. American Marking Corp., 26 N.J. 229, (1958).

It is defendant's position that the plaintiff's reliance on the Guarantee case is misplaced. The Guarantee case dealt with the award of attorney's fees, not a negligence damage award. The issue appealed was simply whether additional attorney fees should be awarded. It did not require the retrial of the entire matter at the Trial Court. Thus, the Court allowed the appeal despite the fact that the Judgment was satisfied.

Plaintiff also relies on the decision in of Adolph Gottscho, Inc., v. American Marking Corp., 26 N.J. 229, (1958). Plaintiff's reliance on the Gottscho decision is misplaced and ignores subsequent case law. In Gottscho, the plaintiff's appeal was filed before the judgment was paid and a warrant to satisfy judgment filed. Id. at 242, 243. A significant procedural difference from the within matter. The plaintiff had clearly preserved their rights by filing the appeal before accepting payment of the judgment. The judgment in the within matter was satisfied well before the plaintiff filed the appeal. Furthermore, plaintiff's counsel concedes in a correspondence dated and filed with the trial court on August 3, 2022 that they "had no problem signing a Warrant to Satisfy as the judgment has in fact been satisfied". In fact, the settlement draft was cashed by the plaintiff on July 11, 2022.

New Jersey Courts have stated "It is a well recognized rule that a litigant who voluntarily accepts the benefits of a judgement is estopped from attacking it on appeal." See, In re Mortgage Guaranty Corp., etc., Act, 137 N.J. Eq. 193, 198 (E.A.1945); Krauss v. Krauss, 74 N.J. Es. 417, 421 (E.A. 1908); 4 Am Jur.2d, Appeal and Error §250 at 745-

746; 4 C.J.S. Appeal Error §215 at 644-646; Tassie v. Tassie, 140 N.J. Super 517 (App. Div. 1976) "*** If the party in whose favor a judgement is rendered received payment thereof *** he probably estops himself from taking an appeal from such judgment, or from further prosecuting an appeal previously taken, on the principle that one will not be permitted to accept and retain the fruits of a judgment and at the same time insist that it is erroneous.***[2 Freeman, Judgments (5 ed. 1925), §1165 at 2406-2407}(Tassie v. Tassie, 140 N.J. Super. 517, 525, (App. Div. 1976))" The rule that a litigant cannot seek appellate review of a judgment under which he has accepted a benefit is but a corollary to the established principle that any act upon the party of a litigant by which he expressly or impliedly recognized the validity of a judgment operates as a waiver or surrender of his right to appeal therefrom." Tassie v. Tassie, 140 N.J. Super. 517, 525, (App.Div.1976); Sturdivant v. General Brass Machine Corp., 115 N.J. Super. 224, 227-228 (App. Div. 1971), certify. Den. 59 N.J. 363 (1971). See 4 Am. Jur. 2d, Appeal and Error, §242 at 7371 4 C.J.S. Appeal Error §212 at 617,627.)"

In the case at hand, plaintiff seeks a new trial on the limited issue of future medical expenses only. Essentially, plaintiff wanted to "have their cake and eat it to" in this situation. If the Court were to remand the matter for a new trial, the new trial would have to be on all issues. The jury would have to hear all testimony of the plaintiff's alleged injuries and rehear all of the plaintiff's and defendant's experts to weigh all of the witnesses' credibility. The payment on the judgment would need to be returned to

defendant and the slate wiped clean. The issue which plaintiff wishes to retry, the plaintiff's alleged future medical bills, are clearly so intertwined with the plaintiff's claims of injury the issues cannot be separated.

POINT II

THE TRIAL COURT CORRECLTY BARRED ANY TESTIMONY AND/OR EVIDENCE REGARDING FUTURE MEDICAL EXPENSES OF PLAINTIFF, LINDA BREHME, SINCE SHE WAS NOT ENTITLED TO RECOVER THOSE FUTURE MEDICAL EXPENSES AS AN ELEMENT OF DAMAGES IN THIS CASE

Plaintiff's counsel alleges that the Appellate Court sidestepped the relevant issue of the plaintiff's claim for future medical expenses. Plaintiff argues that the trial Judge disregarded the relevant statue since N.J.S.A. 39:6A-12 unambiguously states that any medical bills **beyond** available PIP benefits are collectible at trial. Plaintiff ignores the clear language of the statute that the only admissible medical bills are those in excess of available PIP benefits. Plaintiff had $250,000 of PIP benefits available to her through her New Jersey Manufacturer's Automobile Insurance Policy. At the time of trial, New Jersey Manufacturer's Insurance Company had paid only $142,900.00 of the $250,000.00limits available. Since the PIP benefits had not been exhausted, the Plaintiff's claim for future medical bills was properly barred by the trial court. Any evidence of future medical bills in this case were inadmissible in the bodily injury action involving the Defendant since the bills were collected or collectible by PIP pursuant to N.J.S.A. 39:6A-12.

N.J.S.A. 39:6A-12 is the applicable statute. The Statute reads:

39:6a-12 Inadmissibility of evidence of losses collectible under personal injury protection coverage.

12. Inadmissibility of evidence of losses collectible under personal injury protection coverage. Except as may be required in an action brought pursuant to section 20 of P.L.1983, c.362 (C.39:6A-9.1), evidence of the amounts collectible or paid under a standard automobile insurance policy pursuant to sections 4 and 10 of P.L.1972, c.70 (C.39:6A-4 and 39:6A-10), amounts collectible or paid for medical expense benefits under a basic automobile insurance policy pursuant to section 4 of P.L.1998, c.21 (C.39:6A-3.1) and amounts collectible or paid for benefits under a special automobile insurance policy pursuant to section 45 of P.L.2003, c.89 (C.39:6A-3.3), to an injured person, including the amounts of any deductibles, copayments or exclusions, including exclusions pursuant to subsection d. of section 13 of P.L.1983, c.362 (C.39:6A-4.3), otherwise compensated is inadmissible in a civil action for recovery of damages for bodily injury by such injured person. (emphasis added)

The court shall instruct the jury that, in arriving at a verdict as to the amount of the damages for noneconomic loss to be recovered by the injured person, the jury shall not speculate as to the amount of the medical expense benefits paid or payable by an automobile insurer under personal injury protection coverage payable under a standard automobile insurance policy pursuant to sections 4 and 10 of P.L.1972, c.70 (C.39:6A-4 and 39:6A-10), medical expense benefits under a basic automobile insurance policy pursuant to section 4 of P.L.1998, c.21 (C.39:6A-3.1) or benefits under a special automobile insurance policy pursuant to section 45 of P.L.2003, c.89 (C.39:6A-3.3) to the injured person, nor shall they speculate as to the amount of benefits paid or payable by a health insurer, health maintenance organization or governmental agency under subsection d. of section 13 of P.L.1983, c.362 (C.39:6A-4.3).

Nothing in this section shall be construed to limit the right of recovery, against the tortfeasor, of uncompensated economic loss as defined by subsection k. of section 2 of P.L.1972, c.70 (C.39:6A-2), including all unreimbursed medical expenses not covered by the personal injury protection limits applicable to the injured party and sustained by the injured party, including the value of any deductibles and copayments incurred through a driver's secondary insurance coverage and medical liens asserted by a health insurance company related to the

> treatment of injuries sustained in the accident. Medical expenses shall be subject to the current automobile medical fee schedules established pursuant to section 10 of P.L.1988, c.119 (C.39:6A-4.6). In any case in which the recovery is for medical expenses only, a prevailing claimant shall be entitled to reasonable and necessary attorneys' fees incurred by the prevailing claimant in the collection of such medical expenses. (emphasis added)
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> L.1972, c.70, s.12; amended 1983, c.362, s.11; 1988, c.119, s.44; 1990, c.8, s.12; 1998, c.21, s.16; 2003, c.89, s.55; 2019, c.244; 2019, c.245.

The Plaintiff's claim for future medical bills is barred pursuant to N.J.S.A. 39:6A-12, as the medicals are collectible under her PIP policy with New Jersey Manufacturers. Medical expenses are inadmissible in the Civil Trial involving a tortfeasor if the bills are collectible by PIP. See N.J.S.A. 39:6A-12. The same holds true with claims for future medical expenses. In Pitti v. Astegher, 133 N.J. Super 145 (Law Div 1975), plaintiff attempted to admit evidence of future medical expenses when said medical expenses alleging the same would be a consequence of a motor vehicle accident. The Court held, "The concern of the No Fault statute was to eliminate reliance on arbitrary formulas applying or encouraging multiples of damages." Id. at 149. As such, evidence of dollar amounts collectible in the future were deemed inadmissible pursuant to N.J.S.A. 39:6A-12.

The New Jersey Court has also held that a plaintiff who has been denied PIP coverage cannot relitigate the issue in a negligence action. Habick v. Liberty Mutual Fire Ins. Co., 320 N.J. Super. 244, 727 A. 2d 51 (App. Div.), certify denied, 161 N.J. 149, 735 A.2d 574 (1999); Lopez v. Patel, 407 N.J. Super. 79, (969 A.2d.510) (App.Div.2009)

Plaintiff has never presented a letter from her PIP carrier, New Jersey Manufacturers, proving that the $250,000.00 PIP limit has been exhausted. Furthermore, the PIP ledger clearly indicates that only $142,900.00 has been paid out of the PIP policy. The plaintiff goes to great lengths in their brief to point out that the benefits were "not available" to the plaintiff because her PIP carrier "cut her off". Plaintiff and her counsel were completely aware that the plaintiff was "cut off" by her PIP carrier. There were steps that should have been taken by plaintiff or her counsel to protect her rights under her PIP policy of insurance. There is more than $100,000.00 in benefits left on her PIP policy. The plaintiff had a remedy for unpaid medical bills through her PIP carrier, which plaintiff failed to pursue. The Plaintiff's failure to take proper steps to protect her benefits under her PIP policy does not result in the same being admissible at trial to the detriment of the defendant. The trial court properly excluded the issue of future medical expenses since the plaintiff's PIP benefits had not been exhausted and therefore not admissible by the plain language of N.J.S.A. 39:6A-12.

In her appellate brief, plaintiff relies heavily on the case of Parker v. Esposito, 291 N.J.Super. 560 (App.Div.1996), 677 A. 2d 1159. Again, it is defendant position, that the reliance on the Parker case is misplaced. The Court's holding dealt with future lost income. That is not the case here. We are dealing with future medical expenses which would have been paid or payable by the plaintiff's PIP carrier. All the of the case law

cited by plaintiff have one common factor, plaintiff only recourse was from the tortfeasor. That is simply not the case here.

Plaintiff had a significant amount of benefits left on her automobile PIP policy. Plaintiff argues that there is no evidence as to why the PIP carrier "cut off" the plaintiff's benefits. It is submitted that under the statutory framework of the No Fault Statute, it is the responsibility of the plaintiff to pursue payment of her medical bills from her PIP carrier. The plaintiff's medical expenses, when there is available PIP coverage, do not become damages that plaintiff can pursue against the defendant. If this were allowed, it would directly conflict with the purpose of N.J.S.A. 39:6A-12 and the No Fault Statute. Furthermore, if the jury in this case was allowed to speculate about future medical expenses, it would have created a windfall for the plaintiff. Defendant would now be directly responsible for medical expenses that are clearly barred by N.J.S.A. 39:6a-12 and the No Fault Statutory scheme, as plaintiff had available PIP benefits.

Finally, the plaintiff argues that she would be subject to a Medicare lien for future medical bills. This is patently incorrect. The plaintiff has recourse for payment of her medical bills. Statutorily, she is required to pursue payment of her medical expenses from her PIP carrier, New Jersey Manufacturers. The plaintiff has simply failed to pursue her statutory remedy.

CONCLUSION

For the foregoing reasons, the plaintiff's appeal must be denied in its entirety. However, if the matter is remanded to the trial court it is respectfully submitted that the entire verdict should be vacated and all monies paid to plaintiff be returned to defendant.

Respectfully Submitted,
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