

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3523-11T3

ZACHARY C. LEWIS,

Plaintiff-Appellant/  
Cross-Respondent,

v.

CITY OF WILDWOOD, CITY OF WILDWOOD  
RECREATION DEPARTMENT,  
BYRNE COMMUNITY CENTER,

Defendants-Respondents/  
Cross-Appellants,

and

CITY OF WILDWOOD, CITY OF WILDWOOD  
RECREATION DEPARTMENT and BYRNE  
COMMUNITY,

Defendants-Third-Party Plaintiffs,

v.

REMINGTON, VERNICK & WALBERG  
ENGINEERS, INC., LITTLE BUILDERS,  
INC., and SOSH ARCHITECTS, j/s/a,

Third-Party Defendants.

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Submitted - February 13, 2013 - Decided February 27, 2013

Before Judges Axelrad and Nugent.

On appeal from the Superior Court of New  
Jersey, Law Division, Cape May County,  
Docket No. L-387-10.

Hankin, Sandman & Palladino, attorneys for  
appellant/cross-respondent (Robert S.  
Sandman, on the briefs).

Powell, Birchmeier & Powell, attorneys for  
respondents/cross-appellants (Donald A.  
Powell, on the briefs).

PER CURIAM

Plaintiff Zachary Lewis appeals from the summary judgment dismissing the personal injury complaint he filed under the New Jersey Tort Claims Act(TCA), N.J.S.A. 59:1-1 to -:12-3, against defendants City of Wildwood, City of Wildwood Recreation Department, and Byrne Community Center. Plaintiff had sustained injuries to his face while playing basketball at the Byrne Community Center, which the City owned. The trial court ruled that because plaintiff's residual facial scar was not significantly disfiguring, the TCA's limitation on judgment provision, N.J.S.A. 59:9-2(d), precluded him from recovering damages for pain and suffering. The court denied defendants' alternative argument that plaintiff was precluded from recovering damages for pain and suffering because his medical treatment expenses did not exceed the \$3600 statutory threshold. Defendants cross-appeal from that decision.

In making its decision, the court was influenced by its observation that plaintiff repeatedly rubbed his scar during the summary judgment proceedings. The court not only made

credibility determinations based on its observation, but failed to announce either its observation or its credibility determinations until it issued its written decision several days after oral argument, thus depriving the parties of the opportunity to be heard. We reverse. As to the cross-appeal, defendants failed to satisfy the summary judgment standard because they presented no evidence of the reasonable value of medical services rendered to plaintiff. We therefore affirm the trial court's denial of summary judgment on that basis.

I.

The parties do not dispute that defendants are public entities. While playing basketball at the Byrne Community Center, plaintiff fell into the bleachers and struck his forehead on an unprotected metal beam, resulting in lacerations to his forehead, nose, and lip, which required multiple stitches. Medical personnel at Cape Regional Medical Center emergency room treated plaintiff's injuries and billed him \$3866.02 for their services. Following negotiations between the Medical Center and plaintiff's insurance company, the Medical Center accepted \$1804.77 as payment in full of its bill.

Plaintiff commenced a personal injury action under the TCA to recover compensation for his pain and suffering. In response to interrogatories, plaintiff averred that he "sustained a very

substantial scar requiring multiple stitches on [his] forehead, nose and lip." Plaintiff alleged the scar was permanent.

During his deposition, plaintiff testified that as the result of his accident he sustained a vertical laceration, approximately three or three and one-half inches long, that extended from the bridge of his nose toward his hairline. His medical treatment consisted of that which he received at the emergency room and the removal of stitches several days later. Although the scar caused no pain, it made him self-conscious, so he wore hats to conceal it. He also applied sunscreen to prevent the scar from worsening.

Following plaintiff's deposition, defendants moved for summary judgment, alleging plaintiff did not meet the TCA's threshold for recovering compensatory damages for pain and suffering because his scar was not significantly disfiguring and he had not incurred medical expenses in excess of \$3600. The court denied the motion. The court considered the report of plaintiff's reconstructive surgeon, who opined that the scar constituted a permanent disfigurement. The court also viewed photographs of the scar. Although the court commented that the "issue of whether the injury rises to the level of permanent significant disfigurement or unsightliness is questionable," it denied summary judgment because the parties had waived oral

argument and "the court would not dismiss a scar case without seeing the scar."

Defendants subsequently filed a motion they characterized as one for reconsideration and summary judgment.<sup>1</sup> During oral argument, the court visually evaluated plaintiff's scar. Several days after oral argument, the court issued a written decision in which it stated:

Very disappointing to the court were the numerous times during oral argument the plaintiff was rubbing the area just above the nose into his forehead. He did it in a surreptitious manner when the court was seemingly otherwise occupied and not focusing on him. When he would observe the court begin to look directly at him, he would lower his head and stop the rubbing. When the court's head was either turned to the defense side or the court was looking down at papers, he rubbed his scar area in what the Court has concluded was an attempt to inflame it. The rubbing was clearly intentional in an attempt to deceive the Court as to the status of his scar.

Next, the court described the scar:

Plaintiff is a young man of thirty-five years of age who lives in Sarasota, Florida and was tanned from the sun. The color photographs have a red tint and show a skin color that is not close to his natural tan from the sun. The scar from the accident did not stand out as different in color from

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<sup>1</sup> Because the trial court had denied the earlier motion without prejudice, it considered the new motion as a renewal of the original summary judgment rather than a motion for reconsideration.

his natural tan except for the lower part of the scar area which had reddened somewhat by the rubbing.

The predominant feature of the plaintiff's forehead are two [] longitudinal creases in his forehead which are a length approximating three [] to four [] inches in length. The June 2011 photographs show the creases well and they continue to this day.

. . . .

The healing process from this scar from the accident has been excellent. The coloration blends in with his natural coloration except for the area of approximately one [] inch at the lower end where the plaintiff rubbed the scar repeatedly in the courtroom. It is non-keeloidal, i.e., the scar does not extend beyond the original injury. It is not spread or raised. It is also not hypertrophic, i.e., raised and red. There was no indication of inflammation of the scar sight [sic] except that caused by the rubbing in a limited area.

Noting that the scar was neither "unsightly" nor "misshapen," the court concluded the scar could "not be considered a deformity and is certainly not a disfigurement, as the general public, the finders of fact, would see it. In any event, it would not be a disfigurement that is substantial even though it is permanent."

The court denied defendants' argument that plaintiff had not satisfied the TCA monetary threshold. Noting that the hospital billed plaintiff \$3866.02 for services rendered and

accepted as payment in full \$1804.77 from plaintiff's insurance company, the court stated that "[n]o appellate decision has yet decided whether it is the amount the hospital computer set forth initially in a bill or the amount agreed [upon] by contract to be paid and accepted." The court "[did] not see it as its role . . . to create what may well be new law."

## II.

Defendants are public entities. As such, they are only liable for their negligence within the limits of the TCA. N.J.S.A. 59:1-2. The TCA provision at issue in this appeal is N.J.S.A. 59:9-2(d), which states:

No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of \$ 3,600.00. For purposes of this section medical treatment expenses are defined as the reasonable value of services rendered for necessary surgical, medical and dental treatment of the claimant for such injury, sickness or disease, including prosthetic devices and ambulance, hospital or professional nursing service.

The trial court concluded that plaintiff's scar did not satisfy the statutory threshold because it did not constitute a disfigurement. Plaintiff contends the court disregarded the

summary judgment standard when it made a credibility judgment about him, and again when it relied upon its credibility judgment to construe the evidence in a manner other than in the light most favorable to him. Plaintiff submits that if a judge were to objectively examine his scar without bias occasioned by such a credibility judgment, the judge would conclude a triable issue exists as to whether the scar is disfiguring. As to the TCA monetary threshold, plaintiff argues that its purpose is to weed out claims that are not serious; an objective the statute accomplishes by requiring that the court assess the reasonable value of medical services rendered, not the amount negotiated by an insurance company for those services.

Defendants contend the court correctly concluded plaintiff's scar was not permanently and substantially disfiguring. They argue that the court properly considered the appearance, coloration, size, and shape of the scar; and the characteristics of the surrounding skin. Defendants also assert the equitable doctrine of unclean hands, stemming from plaintiff repeatedly rubbing his forehead and scar, bars his compensatory damage claim. To support their argument they have included in the appellate record a DVD of the summary judgment proceeding. Lastly, relying on a definition of "expenses" found in Webster's Dictionary, defendants argue that the statutory definition of

medical treatment expenses should be construed to mean the "financial outlay" or "pay out" for plaintiff's treatment.

A trial court must grant a summary judgment motion if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529-30 (1995). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). If the evidence submitted on the motion "'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

When a party appeals from a trial court order granting or denying a summary judgment motion, we "'employ the same standard [of review] that governs the trial court.'" Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010) (quoting Busciglio v.

DellaFave, 366 N.J. Super. 135, 139 (App. Div. 2004)). We review legal conclusions de novo, however. Henry, supra, 204 N.J. at 330.

We first address the trial court's observations about plaintiff. The court made a factual determination that plaintiff rubbed his scar in an attempt to inflame it, and a credibility determination the plaintiff attempted to inflame his scar to intentionally deceive the court. Neither determination was appropriate in the context of a summary judgment motion.

"While 'genuine' issues of material fact preclude the granting of summary judgment, R. 4:46-2, those that are 'of an insubstantial nature' do not." Brill, supra, 142 N.J. at 530 (quoting Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954)). But the "facts" that are subject to a court's "genuine" analysis are framed by the parties' evidence and pleadings. Rule 4:46-2 requires that a party seeking summary judgment serve a statement of material facts and that the party opposing the motion file a responding statement either admitting or disputing each of the facts in the movant's statement. Those pleadings determine which facts the parties dispute. The court then decides, if appropriate, whether an issue of fact is genuine. R. 4:46-2(c); Brill, supra, 142 N.J. at 540.

When deciding whether a genuine issue of material fact precludes summary judgment, the court must view the competent evidential materials presented to it in the light most favorable to the non-moving party. Ibid. "Credibility determinations will . . . be made by a jury and not the judge." Ibid.

That is not to say that a court must ignore what it perceives to be an attempt by a litigant to deceive it. But a court must at least afford the litigant an opportunity to respond to its perception. Cf. McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 558 (1993) (quoting Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313, 70 S. Ct. 652, 657, 94 L. Ed. 865, 873 (1950)) ("At a minimum, due process requires notice and an opportunity to be heard 'appropriate to the nature of the case.'").

Here, though the court's inferences about plaintiff's motivations may have been accurate, there are other possible explanations for plaintiff's conduct. Perhaps the scar itched; or plaintiff had developed a habit of continually rubbing it. Perhaps the court would have rejected such explanations had plaintiff given them. But, as plaintiff points out, he was deprived of his right to explain why he rubbed the scar.

Because it appears the trial court's decision on the summary judgment motion was influenced by its improper fact-

finding and credibility assessment of plaintiff, we reverse. We express no opinion as to whether the scar constitutes "disfigurement" within the meaning of the TCA statutory threshold.

We further conclude that defendants were not entitled to summary judgment based on their argument that plaintiff failed to meet the TCA's \$3600 threshold. Specifically, we reject defendants' argument that plaintiff did not satisfy the threshold because the amount paid by his medical insurer was less than \$3600.

The relevant statute, N.J.S.A. 59:9-2(d), includes as a prerequisite to a plaintiff recovering pain and suffering damages, that the plaintiff's medical treatment expenses exceed \$3600. There is no need to consult a dictionary to discern the meaning of "medical treatment expenses" because the statute defines it, clearly and unequivocally. See Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 264 (2008) (explaining that when a court interprets a statute, it looks first to the statute's plain language, "seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen").

"[M]edical treatment expenses are defined as the reasonable value of services rendered for necessary . . . medical and

dental treatment of the claimant for such injury . . . ."

N.J.S.A. 59:9-2(d). The "reasonable value" of such services is generally understood to mean an amount within the range customarily charged to patients for such services by medical providers practicing in the relevant field or specialty within the community. See Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. 11, 19-20 (App. Div. 1996). The statute makes no mention of the amount actually paid for medical or dental services. The amount actually paid can vary depending on a multitude of factors, including contractual rates in contracts between medical service providers and medical insurance companies; whether a patient is insured or uninsured and indigent; and whether the medical or dental injuries are covered by automobile insurance subject to medical fee schedules mandated by N.J.S.A. 39:6A-4(a) ("Medical treatments, diagnostic tests, and services provided by the [automobile insurance] policy shall be rendered in accordance with commonly accepted protocols and professional standards and practices which are commonly accepted as being beneficial for treatment of the covered injury.").

The 1972 Task Force Comment to N.J.S.A. 59:9-2 explains that "(t)he limitation that pain and suffering may only be

awarded when medical expenses exceed \$1,000<sup>2</sup> insures that such damages will not be awarded unless the loss is substantial." Nothing in the statute, legislative history, or Task Force Comment suggests the Legislature intended the reasonable value of identical medical services to differ depending upon who pays what for the bill. Rather, the statute clearly and unequivocally uses the value of the services -- not the amount ultimately paid for them -- as the gauge of substantial loss.

Affirmed in part, reversed in part.

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

  
CLERK OF THE APPELLATE DIVISION

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<sup>2</sup> The threshold was increased to \$3600 by L. 2000, c. 126, §32.