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Superior Court of New Jersey,
Appellate Division.

John STANZIALE, Plaintiff-Appellant,
v.
Michael A. JACCARINO, Defendant-Respondent.

Submitted Nov. 9, 2004. Decided Jan. 19, 2005.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, L-6082-02.

Attorneys and Law Firms

John P. **Bostany**, attorney for appellant.

Eugene P. Tazzetto, attorneys for respondent (Kevin D. London, on the brief).

Before Judges WECKER and GRAVES.

Opinion

PER CURIAM.

***1** Plaintiff appeals from a summary judgment dismissing his auto negligence complaint for failure to meet the verbal threshold, that is, the threshold to satisfy the "limitation. on lawsuit option." *See N.J.S.A.* 39:6A-8a, *amended by* Automobile Insurance Cost Reduction Act of 1998, *L.* 1998, *c.* 21, § 11 (AICRA). [1] Under the applicable portion of the amended version of the verbal threshold, now known as the "limitation on lawsuit option," recovery for non-economic damages is limited to persons who have sustained "a permanent injury within a reasonable degree of medical probability." *N.J.S.A.* 39:6A-8a. "An injury shall be considered permanent when the body part ... has not healed to function normally and will not heal to function normally with further medical treatment." *Id.*

In *James v, Torres*, 354 *N.J.Super.* 586, 594-96 (App. Div. 20 02), *certif. denied*, 175 *N.J.* 547 (2003), we held that the "substantial impact" prong of *Oswin v. Shaw*, 129 *N.J.* 290, 318-19 (1992), continues to apply in determining whether a plaintiff can recover non-economic damages. Plaintiff contests the applicability of *Oswin* under AICRA, and that issue is presently pending before the Supreme Court of New Jersey, on appeal as of right, in *DiProspero v. Penn*, No. A-3162-02T1 (App.Div. Jan. 30, 2004). *See R.* 2:2-1(a)(2).

Plaintiff contends that even if the serious impact requirement applies under AICRA, objective evidence of his injury-a torn meniscus that required invasive, arthroscopic surgery-combined with resulting changes in his physical abilities, create a material issue of fact that entitles him to a jury trial.

Assuming for purposes of this appeal that *Oswin* does apply under AICRA, as we held in *James*, we are satisfied that the motion judge erred in granting summary judgment under *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 540 (1995). [2]

Plaintiff was a pedestrian when he was struck by defendant's automobile on November 12, 2002. He suffered a torn medial meniscus in his right knee and a medial collateral ligament injury, for which arthroscopic surgery involving "synovectomy major with partial medial meniscectomy" was performed by Dr. David Gentile on December 12, 2002. Plaintiff's certification in opposition to summary judgment, along 'with his answers to interrogatories and deposition testimony, include these contentions with respect to the subjective impact upon his life: he was out of work at his job as a construction supervisor for a masonry repair firm for approximately five months, until April 2003. Upon his return to work, he found himself "unable to walk normally, or to climb stairs which is necessary ... to supervise workers on job sites." He no longer plays baseball or football with his grandchildren, which he did once each week before the accident; he is unable to take baths due to his limited mobility and has to take showers instead; he limps and has to walk slowly; and he is unable to take his wife dancing. In plaintiff's October 24, 2003 deposition, however, he did not mention an inability to dance as a problem.

***2** Defendant stresses that in that deposition, plaintiff said that playing with his grandchildren was "not a problem." The judge also cited that testimony in his reasons for granting summary judgment. What plaintiff actually said was:

> I'm not a football player, that's for sure. I used to play with the kids baseball. I take it easy now. It bothers me. I can't keep up with them anymore. I have five little grandchildren. I just take it a little easy.

Plaintiff's treating orthopedic surgeon provided a certification in opposition to summary judgment dated January 9, 2004, based upon his last postoperative orthopedic evaluation on

April 9, 2003. Dr. Gentile reported plaintiff's complaints at that time: "he had continued discomfort at times with some persistent swelling. He was still having difficulty' with stair climbing." It was the doctor's "opinion to a reasonable degree of medical certainty that Mr. Stanziale's knee injury has certainly had a serious impact on his life and as described herein the plaintiff has suffered a permanent injury to his knee as a direct result of being struck by a car on November 12, 2002."

At the motion hearing, the judge addressed plaintiff's subjective complaints: absence from work for five months, difficulty going up and down stairs, inability to play football with his grandchildren (which he testified was not a significant problem), inability to get in and out of a bathtub requiring him only to take showers, and inability to take his wife dancing. The judge then concluded "the significant subjective analysis required under *James* is not met by the plaintiff." We infer that the judge found under *Brill* that no reasonable jury could find plaintiff's injury to be serious and permanent under AICRA. We disagree.

Based upon careful review of the record, we are satisfied that plaintiff has presented sufficient evidence of a serious, permanent injury to withstand summary judgment.

Reversed and remanded for trial.

Footnotes

1 Plaintiff's Notice of Appeal fails to indicate that he also seeks to appeal an order denying his motion for reconsideration, and plaintiff has not supplied us with a transcript of the argument and oral decision on that motion. We do not condone that violation of the court rules. Nonetheless, in his brief, plaintiff accurately described the procedural history in the Law Division and supplied a copy of the order denying reconsideration. Defendant has clearly not been prejudiced in any way, and we see nothing to suggest that the judge's reasons for denying reconsideration would change the result on appeal. We therefore deem the Notice of Appeal amended, *sua sponte*, to include the order denying reconsideration.

2 The judge found, and defendant conceded, that there was objective medical evidence of a tear to the medial meniscus, confirmed by an MRI and repaired by arthroscopic surgery, thus satisfying the first prong under *Oswin.*