

New Jersey Supreme Court Weighs In On “Symptom Magnification” And “Malingering”

March 5, 2019 | by Matheu Nunn

On March 4, 2019, the New Jersey Supreme Court issued its opinion in *Alexandra Rodriguez v. Wal-Mart Stores, Inc.*, No. A-2/3-17 (079470) (2019), a negligence case that stemmed from an injury Ms. Rodriguez sustained from a “falling clothing display rack” at Walmart. In lay terms, “symptom magnification” and “malingering” are fancy, and in the case of “malingering,” scientific terms for lying (or being less than credible) about the extent of injuries/pain.

The Appellate Division previously decided in this case that in civil jury trials expert witnesses should be barred from opining on whether the plaintiff-victim is a “‘malingerer’ or a ‘symptom magnifier,’ or some other negative term impugning the plaintiff’s believability” *Rodriguez v. Wal-Mart Stores, Inc.*, 449 N.J. Super. 577, 596 (App. Div. 2017). Although I understood the decision – our case law and evidence rules do not allow witnesses to opine on the credibility of other witnesses – I have to admit, *a piece of me died inside* when I read the Appellate Division decision, which my mentor and friend, the Hon. Jack M. Sabatino, P.J.A.D., decided. Simply put, a well-crafted cross-examination can flesh out a “malingerer” as well as his/her expert (*I know because I have done it to more than one expert – and I thoroughly enjoyed it*). So, too, can a qualified expert present a compelling rebuttal to the malingering plaintiff.

Setting aside the peculiar pleasure I derive from the subject, “malinger” and “somatic” related disorders are referred to in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), an authoritative text published by the American Psychiatric Association. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 309 (5th ed. 2013). In other words, these phrases are grounded in the fields of psychiatry and psychology; they are not mere “bolstering” or “attacking” the credibility of a witness. Indeed, individuals with disorders with somatic symptoms “are commonly encountered in primary care and other medical settings but are less commonly encountered in psychiatric and other mental health settings.” *Ibid.* “Malingering” is defined in the DSM-IV (the prior

iteration of the DSM-V) as “the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs.” American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 683 (4th ed. 2000); see also American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 850 (5th ed. 2013).

Moving back to the Supreme Court’s decision in *Rodriguez*, the Court held that as a threshold issue a trial court must determine whether this line of expert testimony (i.e. somatic disorders, malingering, etc.), meets the relevance standard set forth in N.J.R.E. 401 (“Relevant evidence means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.”). Next, if the testimony is relevant, the trial court must analyze the testimony through N.J.R.E. 403, which prohibits otherwise relevant evidence “if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.” And, where the disputed testimony involves expert opinion, the trial court must be mindful that the “expert” moniker may give a sense of heightened credibility to the expert witness. *State v. Torres*, 183 N.J. 554, 580 (2005). Here, the Supreme Court held that because “there were significant inconsistencies between the objective medical evidence and Rodriguez’s subjective complaints of pain, and to counter the testimony of plaintiff’s medical experts,” the trial court correctly permitted the defense expert to opine on the issues of “somatization” and “symptom magnification.” In a similar vein, the Court reversed the Appellate Division’s categorical rejection of the use of “malingering” expert testimony in civil jury trials.

And, the defense bar has a collective sigh of relief...