

Not Reported in A.2d, 2007 WL 3306761 (N.J.Super.A.D.)  
(Cite as: 2007 WL 3306761 (N.J.Super.A.D.))

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UNPUBLISHED OPINION. CHECK COURT  
RULES BEFORE CITING.

Superior Court of New Jersey,  
Appellate Division.

William E. EVENSON, III, individually, and Heidi  
H. Evenson, individually and as Guardian Ad Litem  
for Kelsey Evenson, a minor, and William Evenson,  
IV, a minor, Plaintiff-Appellant,

v.

Nanak M. SAWLANI, Defendant-Respondent.  
Argued telephonically on Oct. 31, 2007.  
Decided Nov. 9, 2007.

On appeal from the Superior Court of New Jersey,  
Law Division, Union County, Docket No. L-  
2193-04.

Eric D. Katz argued the cause for appellant (Mazie  
Slater Katz & Freeman, attorneys; Mr. Katz, of  
counsel; Mr. Katz and Matthew R. Mendelsohn, on  
the brief).

Jeffrey J. Czuba argued the cause for respondent  
(Hoagland, Longo, Moran, Dunst & Doukas, attor-  
neys; Mr. Czuba, on the brief).

Before Judges STERN and C.S. FISHER.

PER CURIAM.

\*1 Plaintiff appeals from a judgment of September  
19, 2006,<sup>FN1</sup> disposing of the matter as to all  
parties and specifically from an order of March 6,  
2006, granting summary judgment against plaintiff  
William Evenson IV for failure to satisfy the verbal  
threshold. Plaintiff asserts that he submitted proof  
by "objective credible medical evidence" of a  
"swelling in conjunction with range of motion re-  
strictions" and that "the motion judge committed  
reversible error in holding that the infant plaintiff

did not suffer a permanent injury despite a finding  
of permanency by the treating physician." He  
claims to have developed juvenile arthritis "after he  
forcibly struck his lower extremities against the  
back of the front seat in the [vehicle] collision."  
The motion judge rendered a supplemental written  
opinion, dated November 20, 2006, pursuant to R.  
2:5-1(b).

FN1. The judgment is not in the record.

Specifically, plaintiff argues that the judge erred  
"when she concluded that plaintiff failed to adduce  
sufficient credible objective medical evidence" and  
"when she 'reversed' her initial finding that  
plaintiff suffered a permanent injury."

In granting summary judgment, the motion judge  
stated:

The court is satisfied that William Evenson  
IV's injuries are not permanent within the mean-  
ing of the statute. As stated, range of motion tests  
ordinarily do not suffice to establish a permanent  
injury. *See Oswin, supra* at 320. Furthermore, no  
evidence, aside from plaintiff's subjective com-  
plaints of pain and morning stiffness following  
exercise, has been presented to show that his  
ankle will neither heal nor function normally in  
the future even with further medical treatment.  
The X-rays performed of the right ankle did not  
reveal any abnormalities. The fact that Dr.  
Knowles [William's pediatrician who referred  
him to Dr. Yuriko Kimura, a pediatric rheumatol-  
ogist] characterized his findings as objective  
does not make them so. No objective tests were  
performed.

The X-ray report from the hospital in December  
2002 reflected "no evidence of osseous or articular  
abnormality." The diagnosis upon discharge was  
"sprained ankle." In July 2005 one of plaintiff's pe-  
diatricians, Dr. Kelly Knowles, <sup>FN2</sup> found  
"objective findings of notably marked decrease in

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the patient's ability to bend his great toe and second toe." He was "unable to raise his heel from the floor on the right side," suffered "joint pain, morning stiffness and decreased range of motion." As a result, Dr. Knowles believed William had contracted arthritis and referred him to Dr. Yukiko Kimura.

FN2. In May 2003 plaintiff also saw Dr. Joseph F. Altongy, a pediatric orthopedic surgeon who gave an "impression" and recommended more time for recovery.

In August 2005, Dr. Kimura, a pediatric rheumatologist, diagnosed juvenile arthritis caused when plaintiff's feet struck the back of the front seat at the time of impact with defendant's vehicle. Dr. Kimura observed "swelling of his right knee and toes, and tenderness of his ankles with decreased range of motion" in August 2005. On January 16, 2006, Dr. Kimura again found "active swelling of his right knee and toes associated with pain and decreased range of motion."

\*2 As already noted, the motion judge concluded that plaintiff's injuries "are not permanent" because *Oswin v. Shaw*, 129 N.J. 290, 314 (1992), rejected a range of motion evaluation for purposes of finding permanency, and because no objective evidence "has been presented to show that [the] ankle will neither heal nor function normally in the future even with further medical treatment" and because X-rays "did not reveal any abnormalities".

There is merit to the judge's view. No X-ray, MRI or CAT scan provided objective evidence of arthritis or a permanent injury. However, *Oswin*, which includes swelling as "objective evidence," *id.* at 320,<sup>FN3</sup> and the January 18 and February 24, 2006 reports of Dr. Kimura, Chief of Pediatric Rheumatology at Children's Hospital at the Hackensack University Medical Center, present a factual dispute on permanency adequate to survive summary judgment.<sup>FN4</sup> Dr. Kimura's report also sufficiently relates plaintiff's condition to the accident, as does the February 6, 2006 letter of Dr. Andrea Katz, an

associate of Dr. Knowles.

FN3. As Justice Clifford stated, "even though soft-tissue injuries are not apparent in X-rays, they often manifest themselves in objective form, including swelling...." *Ibid.*

FN4. After the summary judgment motion was argued on February 17, 2006, and adjourned as to this plaintiff, Dr. Kimura's supplementary report dated February 24, 2006, was prepared.

We agree with the motion judge that the fact a doctor says evidence is objective is not dispositive. However, based on Dr. Kimura's reports and the language in *Oswin* about swelling, we reverse the grant of summary judgment.

Reversed and remanded for further proceedings consistent with this opinion.

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