IN THE WAKE OF THE *ZIMMER* DECISION, CAN A TORT PLAINTIFF INTRODUCE EVIDENCE OF A SOCIAL SECURITY DISABILITY AWARD AT THE TIME OF TRIAL?

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Recently, in the published decision of *Villanueva v. Zimmer,* the Appellate Division has settled an arguably open issue of law, namely of what evidentiary value is a personal injury plaintiff's Social Security Administration (SSA) disability award at the time of the injured party's trial.[1] In *Zimmer,* the court held the Law Division judge correctly barred evidence of that award during the trial.[2]

BACKGROUND

This case was debatably an open area of law in the personal injury context. As per a 2001 Appellate Division published decision, *Golian v. Golian*, the issue had already been resolved in the context of employability in a family law setting.[3] In that decision, the court held that, as a matter of law, not only was an SSA award as to disability admissible at trial, but it was also presumptive evidence of a disability.[4]

In *Golian*, the Appellate Division ruled that an SSA determination of disability created a rebuttable presumption of disability in a subsequent unrelated proceeding.[5] Specifically, *Golian* addressed the amount of permanent alimony awarded to the plaintiff wife.[6] On appeal the plaintiff argued the trial court erred in refusing to recognize that her prior SSA award of disability provided evidence of disability to refute the argument of imputed income based on apparent employability.[7] The trial court had considered the SSA award but held it did not create sufficient proofs that the wife was disabled.[8]

On appeal, the court noted that an SSA determination did require a finding that the person's physical and mental impairments were of "such severity" that

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1. Villanueva v. Zimmer, 69 A.3d 131 (N.J. Super. Ct. App. Div. 2013).
2. *Id.* at 141-42.
3. Golian v. Golian, 781 A.2d 1112 (N.J. Super. Ct. App. Div. 2001).
4. *Id.* at 1115.
5. *Id.*
6. *Id.* at 1114.
7. *Id.* at 1113-14.
8. *Id.* at 1114.

one could not engage in any "other kind of substantial gainful work."[9] Without holding that either res judicata, collateral estoppel or the entire controversy doctrine applied in this matter, the court noted the purposes behind these general legal principles.[10] With these principles in mind, the court essentially gave the SSA award a presumption of correctness.[11] It cited to case law holding that in limited circumstances a court may give res judicata effect to an administrative finding where the party disputing the administrative finding cannot refute the finding's validity.[12]

Applying this principle, the court held that the defendant husband had failed to "impugn the reasonableness of the SSA determination in the plaintiff's case."[13] As such, the court held that "[i]n the circumstances of this case . . . the SSA adjudication of disability constitutes a *prima facie* showing that plaintiff is disabled . . . and the burden shifts to defendant to refute that presumption."[14]

An important footnote of the *Golian* decision is the court's finding that the plaintiff's husband had actually assisted his wife, during their marriage, in applying for the very disability award he later sought to denounce.[15] Therefore, an underlying rationale of the court's decision is that it would be unjust to allow the defendant husband to deny the soundness of an SSA award of disability that he himself helped procure.[16]

Nearly twelve years later, the *Zimmer* appellate panel visited this issue's application in the personal injury context. Between those decisions, very few cases discussed the relevance of the *Golian* holding in tort matters.[17] The Appellate Division had also recently published a decision where it wrangled in the outer edges of *Golian*. In another family law matter, the court in *Gilligan v. Gilligan*, held that an SSA disability award alone cannot create a presumption of disability without some other indicia of disability from other evidence.[18] The court noted the *Golian* spouse had provided other evidence of her alleged

9. *Id.* at 1115.

10. *See id.* (explaining the legal principles behind res judicata, collateral estoppel, and the entire controversy doctrine).

11. *Id.*

12. *Id.* (citing Sheeran v. Progressive Life Ins. Co., 440 A.2d 469 (N.J. Super. Ct. App. Div. 1981)).

13. *Id.*

14. *Id.* at 1115.

15. *Id.* at 1113.

16. *Id.* at 1115 (noting that "[d]efendant assisted plaintiff in obtaining the [SSA] award" immediately before stating the holding).

17. *See* Dibartolomeo v. Herman, No. A-5034-05T2, 2008 N.J. Super. LEXIS 2265, at *19 (App. Div. Feb. 4, 2008) (holding that, as per *Golian*, an injured plaintiff's SSA adjudication of disability creates a rebuttable presumption the plaintiff is in fact disabled); Verdi v. Borough of Hopatcong, No. A-2438-11T1, 2012 N.J. Super. LEXIS 2361, *22 (App. Div. Oct. 19, 2012) (questioning the trial court's decision to not give an SSA award any weight when deciding a Tort Claims Act injury threshold summary judgment motion).

18. Gilligan v. Gilligan, 50 A.3d 110, 117-18 (N.J. Super. Ct. Ch. Div. 2012).

disability through medical records and testimony.[19] Also in *Gilligan*, and in contrast to *Golian*, there was no proof that the injured spouse had access to the SSA records directly so she could analyze the underlying basis for the award.[20]

Before discussing the *Zimmer* decision and its effect, it is important to understand why the admission of an SSA award in a personal injury trial is of such import. From the plaintiff's perspective, to enter the SSA award as substantive evidence of disability is a monumental advantage to its side. By virtue of allowing this into evidence, the plaintiff can now tell the jury that another fact finder, a federal court judge (albeit an administrative judge), has already reviewed the same evidence and determined their client was disabled from the loss. It is logical that if allowed to introduce this evidence, a jury may simply find that if a federal judge has already decided the plaintiff is disabled, who are they to argue? It is this essential fear that drives the defense to argue against its preclusion. Introduction of this evidence is clearly a ticking time-bomb to avoid at all costs.[21]

Assuming the court allowed in this evidence, what rebuttal would the defendant be permitted? Could it inform the jury, through judicial notice, legal argument or with an expert witness, that SSA determinations are non-adversarial, with no opportunity for the defense to contest the award, and that the award are periodically reviewable? A cogent argument can be made these distinctions would be lost on the ordinary jury.

THE *ZIMMER* DECISION

It was in this context that the *Zimmer* court entered into this thorny thicket. In *Zimmer*, the plaintiff alleged she was totally disabled following a rear-end motor vehicle accident in which she injured her back resulting in undergoing lumbar epidural injuries, manipulations under anesthesia as well as being recommended spinal fusion.[22]

Prior to trial, the SSA issued a four page award wherein it determined the plaintiff was entitled to monthly disability benefits as she was found to be disabled as of the day of the accident.[23] Prior to trial, the court granted defendant's motion to bar any mention of the SSA determination to establish

19. *Golian*, 781 A.2d at 1113-14.

20. *Gilligan*, 50 A.3d at 115-16 (noting that defendant was relying only upon motion papers for the judgment).

21. *See* Norwest Bank, N.A. v. Kmart Corp., No. 3:94-CV-78RM, 1997 U.S. Dist. LEXIS 3422, at *9-10 (N.D. Ind. Jan. 23, 1997) ("Indeed, the greatest risk of unfair prejudice appears to be that the jury will afford too much weight to the social security determination: that the jury will rely on that determination to the point of excluding the other evidence presented at trial concerning [the plaintiff]'s condition . . . ."). The *Norwest Bank* case provides an interesting twist on the normal positions seen in these cases. In that case, the injured plaintiff sought to bar evidence of an SSA award denying her claim for disability. *Id.* at *4-6.

22. Villanueva v. Zimmer, 69 A.3d 131, 134 (N.J. Super. Ct. App. Div. 2013).

23. *Id.* at 135.

disability and/or an inability to work.[24]

However, during the course of the trial the defense attorney argued to the jury that only the plaintiff herself claimed she could not work.[25] Before the plaintiff closed, the plaintiff's attorney argued that the defense had opened the door as to the SSA decision and requested that the jury not only be told that she was found disabled from the SSA but also that the jury be told that the SSA award created a rebuttable presumption of correctness.[26]

The trial court judge rule partially in the plaintiff's favor by informing the jury of the SSA award.[27] However, the judge also told the jury it was "ultimately [the jury's] determination to make, as to what if any, abilities plaintiff does or doesn't have as a result of the accident. . .that occurred."[28] Following a verdict of no cause of action dismissing her matter, the Plaintiff appealed.[29]

On appeal, the Appellate Division affirmed the trial court's order first noting that the neither the principles of res judicata nor collateral estoppel applied to this case.[30] However, the Court recognized, the Plaintiff was not relying on either doctrine as her basis to admit this evidence.[31] Instead, the Plaintiff relied primarily on the *Golian* decision.[32] The court then discussed whether an SSA award, admittedly a hearsay document, could be entered into evidence.[33]

A. SOCIAL SECURITY DISABILITY AWARD IS HEARSAY NOT ADMISSIBLE WITHIN ANY EXCEPTION

The only likely exception to enter the SSA determination, the court found, was under the "public records exception" to the hearsay bar.[34] The court noted the policy of allowing such statements in as evidence is that statements made by a public official, acting in their official duty, are likely to make an accurate report.[35] Nonetheless, they held the policy behind this exception was not to allow in "conclusionary [sic] material resulting from official investigations . . . ."[36]

24. *Id.*
25. *Id.* at 136.
26. *Id.*
27. *Id.* at 136-37.
28. *Id.* at 136.
29. *Id.* at 137.
30. *Id.* at 137-38.
31. *Id.* at 138.
32. *Id.* (citing plaintiff's reliance on Golian v. Golian, 781 A.2d 1112 (N.J. Super. Ct. App. Div. 2001)).
33. *Golian*, 781 A.2d at 1115.
34. *See* N.J. R. EVID. 803(c)(8).
35. *Zimmer*, 69 A.3d at 139.
36. *Id.* at 140.

The court held that the hearsay exception did not "authorize the admission of an SSA determination of disability as a hearsay exception in the circumstances of this case."[37] The court noted that an administrative law job was neither "an act done by the official" nor an "act, condition or event observed by the official."[38]

The court also supported its holding by finding that there is no adversarial process in a SSA determination.[39] Further, the court found a SSA holding was only of "dubious probative value" and in fact an administrative law judge actually "has an affirmative obligation to assist the claimant in developing the facts."[40] As well, and perhaps more importantly, the court also noted that an SSA disability determination is periodically reviewed and can be overturned upon review, while a jury verdict, absent a successful appeal, is permanent.[41]

B. THE *GOLIAN* DECISION WAS LIMITED TO THE FACTS OF ITS CASE

The court also addressed the contradictory *Golian* opinion and noted that that holding was specifically limited, by its own opinion, to "the circumstances of [that] case."[42] As well, the court explained that in *Golian* the party opposing the admission of the SSA award actually had assisted his wife in completing the SSA application.[43] Specifically, the court stated here the "defendant. . .was not involved in the SSA proceedings, had no input with respect to the determination of disability, and did not submit any defense medical reports to the ALJ. Therefore, plaintiff's reliance on *Golian* is misplaced."[44] Finally, and without much discussion, the court also held that admission of this SSA award would be prejudicial and would likely mislead a jury.[45]

ZIMMER'S LEGACY

Regardless of the disagreement between these two decisions, the *Zimmer* case is notable as it provides guidance for the day-to-day plaintiff-lawyers as well as the defense bar in dealing with this all too frequent issue in personal injury cases. Whether one agrees with the opinion or not, litigators may now have one less issue to brief.

The *Zimmer* decision cannot overrule the *Golian* decision as both opinions were issued by courts of the same authority.[46] Nonetheless, to read and apply

37. *Id.* at 141.

38. *Id.* at 142 (quoting N.J. R. EVID. 803(c)(8)).

39. *Id.*

40. *Id.*

41. *Id.* at 142.

42. *Id.* at 143.

43. *Id.*

44. *Id.*

45. *Id.* (citing N.J. R. EVID. 403).

46. *See* Luchejko v. City of Hoboken, 23 A.3d 912, 922-23 (N.J. 2010) (discussing stare decisis among equal courts and when distinguished fact patterns merit re-evaluation of prior case law while not overruling it).

the *Zimmer* court, if taken at face value, would mean that *Golian* is no longer good law in any circumstances. The Rules of Evidence do not change from one civil matter to the next. If SSA awards are hearsay and non-admissible, then they are hearsay and non-admissible at all trials, regardless of whether the matter is personal injury, divorce, or any other civil matter. As such, it is hard to square the *Zimmer* matter without finding that it essentially reverses *Golian*.

However, there are some policy and practical distinctions between family law matters and personal injury cases not expressly stated by the *Zimmer* court. In family law cases the issue of disability may be seen as a secondary issue in terms of the primary matters of alimony and child support awards. On the other hand, in tort matters issues of disability go to the heart of damages, the core of these types of matters. Another important distinction is that in New Jersey all family law trials are done via bench trials, thereby negating fact-finder confusion or prejudice concerns.[47]

In light of the above, while the *Zimmer* decision provides some guidance to trial courts, it is likely that this issue needs to be resolved by the New Jersey Supreme Court.

47. N.J. CT. R. 4:3-1(a)(3) (classifying Family Court as part of the Chancery Division and part of courts of equity); *see* Ward v. Merrimack Mut. Fire Ins. Co., 711 A.2d 394 (N.J. Super. Ct. App. Div. 2000) (noting that "a litigant seeking an equitable remedy does not enjoy the right [to trial by jury] even if both parties request one").