SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2926-20

FRANK VASATURO, JR., as administrator of the estate of LUCILLE A. VASATURO, and FRANK VASATURO, JR., in his own right,

Plaintiffs-Appellants,

v.

ELMWOOD HILLS HEALTHCARE CENTER, LLC, DR. JOSEPH LIBBY, M.D., KENNEDY MEMORIAL HOSPITAL-WASHINGTON TOWNSHIP, KENNEDY HEALTH CARE CENTER, DR. JAMES C. D'AMICO, D.O., and SIMON SHAIN,

Defendants,

and

INSPIRA MEDICAL CENTER-WOODBURY, INC. f/k/a UNDERWOOD MEMORIAL

HOSPITAL,[1]

Defendant-Respondent.

Argued October 25, 2022 – Decided November 4, 2022

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1157-15.

Mitchell Lee Goldfield argued the cause for appellants (Jeff Thakker, of counsel; Mitchell Lee Goldfield, on the brief).

Andrew S. Winegar argued the cause for respondents (Parker McCay, PA, attorney; Andrew S. Winegar and Thomas M. Walsh, on the brief).

PER CURIAM

Plaintiff Frank Vasaturo, Jr., as administrator of the Estate of Lucille A. Vasaturo and individually, appeals from a Law Division order granting summary judgment to defendant Inspira Medical Center-Woodbury, Inc. f/k/a Underwood Memorial Hospital (Inspira), and a second order denying reconsideration. We affirm.

[1] Improperly plead as Inspira Medical Center-Woodbury and Underwood Memorial Hospital.

We take the following facts from the summary judgment record, viewing them in the light most favorable to the non-moving plaintiff. See Richter v. Oakland Bd. of Educ., 246 N.J. 507, 515 (2021).

Decedent Lucille A. Vasaturo was admitted as a patient at Inspira from March 30 to April 12, 2013, for a "clogged carotid artery." At admission she had "a lengthy list of maladies" including "multiple kinds of bed sores, multiple levels of skin maladies, [and] other morbidities going on." Decedent was outfitted with a "fall risk" bracelet. While enroute to the bathroom, decedent fell and suffered a fractured hip. She was catheterized the same day and developed a large blood clot due to improper urinary catheterization. Decedent did not undergo surgery for the fractured hip.

Decedent was transferred to defendant Kennedy Health Care Center on April 12, 2013. The following day, she was transferred to defendant Kennedy Hospital-Washington Township for surgery to remove the blood clot in her bladder. Decedent was transferred back to Kennedy Health Care Center on April 20, 2013.

The record shows that at various times from April 22 to June 10, 2014, decedent suffered from stage II pressure ulcers, a sacral rash, persistent diarrhea, dehydration, severe hypoalbuminemia, acute encephalopathy, profound

hypotension, a severe Clostridium Difficile infection, and septic shock. Plaintiff attributes these conditions to the negligence of the other defendants.

Plaintiff pleaded causes of action for negligence, a survival action, wrongful death, and negligent infliction of emotional distress. During four years of discovery, plaintiff offered a single expert, Jean Costa, R.N., B.S.N., to opine on the standard of care elements of the negligence claim against Inspira. Plaintiff did not name a causation expert.

Costa has over forty years of experience as a Registered Nurse, is a board certified Gerontological Nurse, and possesses a Nursing Home and Assisted Living Administrator license. In her report, Costa stated "to a reasonable degree of professional certainty" that "staff at Underwood-Memorial Hospital failed to prevent harm and failed to provide the necessary bathroom assistance" for decedent which "resulted in [her] falling and sustaining a left greater trochanter hip fracture." She further opined that staff failed to "meet the standard of care for nursing facilities."

During her discovery deposition, Costa acknowledged she had no training on how to interpret radiologic imaging or CT scans. She also acknowledged she is not qualified to "make a diagnosis of orthopedic conditions," "have an opinion about indicated treatment for any orthopedic conditions," or "give an opinion

about what treatment was actually necessary or actually took place for [decedent's] orthopedic diagnoses, specifically her left hip fracture[.]" She also conceded she was not qualified to speak on the necessity of treatment provided to decedent and would not be testifying at trial about how she may have improved or declined after her hip fracture because it is "outside [her] scope of practice." As to the hip fracture diagnosis, Costa relied upon the report of decedent's treating physician, Dr. Wilkinson.

Inspira points out that several pages of handwritten progress notes that plaintiff relies upon were not written or signed by Dr. Wilkinson and contained the signatures of four different physicians who were not identified in plaintiff's answers to interrogatories. In addition, plaintiff did not identify Dr. Wilkinson as a treating physician during discovery. Instead, he was first identified by plaintiff long after discovery had ended, while Inspira's motion for summary judgment was pending. Plaintiff likewise did not identify the radiologist who read the decedent's imaging studies during discovery.

Inspira moved for summary judgment based on plaintiff's lack of a qualified causation expert. Judge Morris Smith found this was not a common knowledge injury and that a physician was required to explain causation to the jury, or at least interpret the radiology report which showed the fractured hip.

The judge noted plaintiff's nursing expert admitted she was not qualified to make this causal connection or to diagnose decedent's injuries to properly explain causation to the jury and would only testify that the standard of care was breached. For these reasons, summary judgment was granted to Inspira.

Plaintiff moved for reconsideration, contending this was a common knowledge case as to causation. Judge Sherri Schweitzer agreed with Judge Smith that a causation expert was necessary. Judge Schweitzer denied reconsideration, finding plaintiff did not show Judge Smith overlooked any arguments or acted arbitrarily in granting summary judgment.

This appeal followed. Plaintiff raises the following arguments:

> POINT I
>
> JEAN COSTA WAS DULY QUALIFIED AS A NURSING EXPERT; SHE WAS COMPETENT TO TESTIFY ON DEFENDANT'S ALLEGED NEGLIGENCE ON APRIL 3, 2013 AND ITS CAUSAL RELATIONSHIP TO [DECEDENT'S] FALL-DOWN ACCIDENT AND HER ACKNOWLEDGED HIP FRACTURE.
>
> POINT II
>
> VIEWING THE RECORD IN THE LIGHT MOST FAVORABLE TO PLAINTIFF, THERE WAS (IS) SUFFICIENT EVIDENCE THAT DEFENDANT NEGLIGENTLY ALLOWED [DECEDENT] TO SUSTAIN HER FALL-DOWN ACCIDENT, RESULTING IN HER HIP FRACTURE; SUMMARY

JUDGMENT BELOW WAS IMPROPERLY GRANTED AND SHOULD BE REVERSED.

A. Defendant's Nursing Staff Assumed A Duty To Provide [Decedent] Assistance When She Needed To Use The Lavatory.

B. The Breach of Duty Is Sufficiently Established.

C. There Is Sufficient Evidence of Causation.

D. There Is Sufficient Evidence of Damages.

We find no merit in these arguments and affirm substantially for the reasons expressed by Judge Smith in his oral decision granting summary judgment and by Judge Schweitzer in her oral decision denying reconsideration. We add the following comments.

Appellate courts review a trial court's grant of a summary judgment motion de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). Rule 4:46-2 provides that the trial court must grant a summary judgment motion if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995).

In determining whether there is a genuine issue of material fact, the "court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (alteration in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)). "Summary judgment should be granted . . . 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Ibid. (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

Generally, "[t]o establish a prima facie case of negligence in a medical-malpractice action, a plaintiff must present expert testimony establishing (1) the applicable standard of care; (2) a deviation from that standard of care; and (3) that the deviation proximately caused the injury." Gardner v. Pawliw, 150 N.J. 359, 375 (1997) (internal citations omitted); accord Rosenberg v. Tavorath, 352 N.J. Super. 385, 399 (App. Div. 2002).

Plaintiff argues that when considering a motion for summary judgment, "[t]he court's function is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021) (quoting Brill, 142 N.J. at 540). While

that principle must be followed, summary judgment is appropriate in a professional negligence case if the plaintiff has not identified a competent causation expert in discovery.

In State v. One Marlin Rifle, 319 N.J. Super. 359, 369 (App. Div. 1999), we addressed the use of a registered nurse to provide testimony regarding causation and diagnosis, mindful of the constraints imposed by N.J.S.A. 45:11–23(b), which differentiates between a diagnosis by a nurse and a medical diagnosis. N.J.S.A. 45:11-23(b) provides, in part: "Diagnosing in the context of nursing practice means the identification of and discrimination between physical and psychosocial signs and symptoms essential to effective execution and management of the nursing regimen . . . . Such diagnostic privilege is distinct from a medical diagnosis." As we explained in One Marlin Rifle:

> While the decision to permit a witness to testify as an expert generally rests within the sound discretion of the trial court, absent an abuse of discretion, the normal test for competency appears constrained here by a statutory provision limiting the practice of certain registered professional nurses. We note in passing that N.J.S.A. 45:11–23b permits registered nurses to diagnose human responses to health problems, however, it prohibits them from providing a medical diagnosis. Hence, the statute recognizes a firm distinction between nursing diagnosis and medical diagnosis. A nursing diagnosis identifies signs and symptoms only to the extent necessary to carry out the nursing regimen rather than

> making final conclusions about the identity and cause of the underlying disease.
>
> [319 N.J. Super. at 369 (footnote omitted).]

Plaintiff originally stated that Costa would not be offering causation or damages opinions. And later, Costa testified at her deposition that she was not qualified to diagnose, treat, or otherwise opine on the hip fracture and would be testifying on the standard of care. Costa stated she was not qualified to "give an opinion about what treatment was actually necessary or actually took place for [decedent's] orthopedic diagnoses, specifically her left hip fracture." She had no training in radiology and was not qualified to interpret radiology studies, which is necessary to diagnose a hip fracture. She agreed that "nurses do not make final conclusions about the identity and cause of [] underlying disease[s]."

Plaintiff cannot prove causation by having Costa refer to a medical report of Dr. Wilkinson that she reviewed. Doing so would violate the holdings in Agha v. Feiner, 198 N.J. 50, 53-54 (2009), James v. Ruiz, 440 N.J. Super. 45, 51 (App. Div. 2015), and Brun v. Cardoso, 390 N.J. Super. 409, 411, 424 (App. Div. 2006). Plaintiff's reliance on an unpublished opinion is misplaced. Unpublished opinions do not constitute precedent and are not binding upon any court. R. 1:36-3.

Moreover, treating physicians may not testify beyond any issues relevant to diagnosis and treatment of the individual patient if the party offering their testimony has not disclosed them as expected trial witnesses. Delvecchio v. Twp. of Bridgewater, 224 N.J. 559, 579 (2016). Here, the form interrogatories propounded by defendants required plaintiff to disclose each expert and treating physician who were expected to be called at trial. Plaintiff's generic reference to "all persons identified in medical records" is insufficient because it does not specifically identify the witnesses or summarize their expected testimony. Ibid. Such vague descriptions in response to the specificity required by the form interrogatories do not satisfy a party's discovery obligations. Ibid. Plaintiff was required to name each treating physician that would be called to testify and disclose their area of specialty and address. See ibid. (stating that Rule 4:10-2(d) "authorizes discovery by interrogatory of 'the names and addresses of each person whom the other party expects to call at trial as an expert witness, including a treating physician who is expected to testify[.]'" (alteration in original) (quoting R. 4:10-2(d)(1))). In addition, "under the court rules, a party seeking to present treating physician testimony at trial must disclose the substance of the witness's anticipated testimony, and the basis for that testimony, if requested to do so in discovery." Ibid. Plaintiff did not identify Dr. Wilkinson

or disclose any of this information during discovery. See R. 4:17-7 (requiring amended answers to interrogatories to be served at least twenty days prior to the discovery end date). This delay thwarted Inspira's right "to explore the treating physician's opinions in a deposition pursuant to Rule 4:10-2(d)(2), as well as through supplemental written discovery." Delvecchio, 224 N.J. at 579.

Here, the statements made in the radiology report prepared by a non-testifying radiologist are inadmissible hearsay. See James, 440 N.J. Super. at 63 (noting the "case law in our State has traditionally admitted 'routine' findings of experts contained in medical records that satisfy the business record exception, but has excluded 'diagnoses of complex medical conditions' within those records." (quoting State v. Matulewicz, 101 N.J. 27, 32 n.1 (1985))).

In Brun, we concluded that where an interpreting radiologist was unavailable to testify, that radiologist's conclusions could not be "bootstrapped" into evidence by an expert unqualified to read an MRI. 390 N.J. Super. at 421. In Agha, the Court explained that N.J.R.E. 703 was "not intended as a conduit through which the jury may be provided the results of contested out-of-court expert reports." 198 N.J. at 63. "In short, under N.J.R.E. 703, an expert may give the reasons for his opinion and the sources on which he relies, but that testimony does not establish the substance of the report of a non-testifying

physician." Id. at 64. The Court concluded that "[o]nly a physician who was qualified by education or training to interpret the films and, in fact, did so, could have brought the [MRI] conclusion to the jury as a matter of substance." Id. at 67. In James, we held that a testifying expert may not be asked whether his opinion accords with the conclusions of a non-testifying expert as a means to have the jury consider the substance of the non-testifying expert's report. 440 N.J. Super. at 71.

Judge Smith correctly decided that Costa was not competent to opine as to medical causation and could not testify regarding the substance of a causation opinion contained in a medical report of a non-testifying treating physician. Without a witness competent to testify as to medical causation, plaintiff was unable to prove that element of professional negligence.

Judge Smith rejected plaintiff's argument that medical causation could be proven under the common knowledge doctrine. We concur. The common knowledge "doctrine applies where 'jurors' common knowledge as lay persons is sufficient to enable them, using ordinary understanding and experience, to determine a defendant's negligence without the benefit of the specialized knowledge of experts.'" Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387, 394 (2001) (quoting Est. of Chin ex rel. Chin v. St. Barnabas Med. Ctr., 160 N.J.

454, 469 (1999)). In common knowledge cases, a jury is permitted to supply the applicable standard of care "from its fund of common knowledge" and assess "the feasibility of possible precautions which the defendant might have taken to avoid injury to the plaintiff." Sanzari v. Rosenfeld, 34 N.J. 128, 142 (1961).

The common knowledge doctrine applies only to the issue of standard of care and is properly invoked only as to where the "carelessness of the defendant is readily apparent to anyone of average intelligence and ordinary experience." Est. of Chin, 160 N.J. at 469-70 (quoting Rosenberg ex rel. Rosenberg v. Cahill, 99 N.J. 318, 325 (1985)). The common knowledge doctrine does not apply to the contested issue of medical causation relating to the hip fracture and the subsequent medical conditions and damages allegedly caused by the hip fracture.

Lastly, we briefly address the denial of plaintiff's motion for reconsideration. Plaintiff has not briefed that issue. We deem it waived. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived.").

Affirmed.