IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM R. SIMMONS,	§	
	§	No. 630, 2007
Plaintiff Below,	§	
Appellant,	§	Court Below: Superior Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
BAYHEALTH MEDICAL CENTER,	§	C. A. No. 06C-08-136
INC., d/b/a KENT GENERAL	§	
HOSPITAL,	§	
	§	
Defendant Below,	§	
Appellee.	§	

Submitted: April 30, 2008
Decided: May 15, 2008

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices.

O R D E R

This 15th day of May 2008, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. William R. Simmons ("Simmons") appeals from a Superior Court order granting summary judgment to Bayhealth Medical Center, Inc. ("Bayhealth") and dismissing Simmons' medical malpractice action against Bayhealth. On appeal, Simmons claims that the Superior Court erred in granting summary judgment to Bayhealth because the medical expert testimony proffered by Simmons satisfied the statutory requirements of 18 *Del. C.* § 6853. Because the Superior Court

reversibly erred in granting summary judgment to Bayhealth, we reverse and remand.

2. On October 21, 2005, Simmons was admitted to the Kent General Hospital in Dover, a facility operated by Bayhealth, for treatment of a kidney stone. At that time, Simmons was 77 years old, weighed approximately 250 pounds, and had several other medical issues, including renal failure, sepsis and atrial fibrillation. Simmons was a patient in the Intermediate Care Unit of the hospital, and was taking various medications for those medical problems. According to a report prepared by Bayhealth, Simmons' risk of falling down was moderate to high. While he was a patient at Kent General, Simmons sustained injuries as a result of a fall.

3. On October 29, 2005, Nurse Meghan Farrell, R.N. ("Farrell") started her shift at 7:00 a.m. She got Simmons out of bed and into a chair. After eating his breakfast, Simmons asked to go to the bathroom. Farrell encouraged Simmons to use the bedpan instead, but Simmons insisted on going to the bathroom. Farrell then agreed, assisted Simmons in walking to the bathroom, and instructed him on the use of the call bell and safety rail. After Simmons indicated that he was ready to stand up from the toilet, Farrell stood by his side to assist him. Simmons "stood up and went right back down." Because Simmons was a heavy person, Farrell realized that she could not stop him from falling, and instead "assisted him to the

floor." As a result of that fall, Simmons sustained a fractured ankle, which is the basis for this lawsuit.

4. According to Farrell, after the incident Simmons told her that "his leg gives out on him all the time." Farrell testified that even though Simmons' leg and foot were clearly deformed and broken, Simmons said that he felt no pain and wanted to stand up on his fractured leg. After the fall, Farrell and another nurse helped Simmons stand up and then sat him in a chair.

5. This malpractice action was filed in August 2006. An Affidavit of Merit from Dr. Demetrios Zerefos ("Dr. Zerefos"), attached to Simmons' opening brief in the Superior Court, opined on the standard of care, as follows:

> [1.] I have been asked to review the above-referenced matter and provide an opinion regarding the care and treatment that was rendered to [Simmons] by Kent General Hospital. Based upon my review I can say within a reasonable degree of medical probability that there are reasonable grounds to believe that there has been healthcare medical negligence committed by Kent General Hospital which caused [Simmons'] injury, namely a comminuted fracture in the left ankle, while he was a patient at Kent General Hospital on October 29, 2005. [Simmons] sustained this fracture when he was allowed to go to the bathroom unattended and fell despite the fact [that] both his chart and a notation on the door indicated that he was at risk to fall.
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> [2.] The standard of care in the State of Delaware for the treatment of patients in the hospital would require such care and attention especially for an elderly patient with [Simmons'] medical condition who should not have been allowed to walk unattended so as to preclude and prevent such a fall and resulting fracture from occurring. [Simmons] would not have sustained such a fracture with proper attention and care. [Simmons'] fall with the resulting injury was the

> result of a deviation from the required standard of care of a patient in the hospital by [Bayhealth's] employees.[1]

6. The Affidavit of Merit was provided to Bayhealth during discovery. Simmons identified Dr. Zerefos as his expert on the issues involving the standard of care, breach of the duty of care, and causation. Bayhealth identified no experts, but instead took a discovery deposition of Dr. Zerefos on May 10, 2007.

7. In his deposition testimony, Dr. Zerefos articulated an opinion that was somewhat less conclusory than the one stated in his Affidavit of Merit. His testimony, fairly summarized, was that where a patient has a high or moderate risk of falling, weighs 250 pounds, and is dizzy or not alert, it is a breach of the standard of care for only one nurse to assist that patient in going to the bathroom and in standing up from the toilet. Dr. Zerefos did not conclusively opine as to whether or not at that time Simmons was alert. Dr. Zerefos was, however, skeptical about Simmons' alertness, and identified the following facts as suggesting that he might not have been alert: (i) Simmons felt no pain after the fall, even though his ankle was fractured; and (ii) Simmons was hypertensive and was taking medication for his

[1] Dr. Zerefos' Affidavit of Merit, dated August 9, 2006.

heart problems (arrhythmia, atrial fibrillation), which might have caused his blood pressure to fall upon standing up quickly.[2]

8. On October 1, 2007, Bayhealth moved for summary judgment, challenging the legal sufficiency of Simmons' proffered expert testimony under 18 *Del. C.* § 6853. The Superior Court heard oral argument on November 28, 2007. Because Dr. Zerefos' opinion consisted of both the Affidavit of Merit and his discovery deposition, Simmons' counsel requested permission to clarify or summarize Dr. Zerefos' ultimate opinion in a single, integrated document. The Superior Court denied that request, holding that the discovery deadline had expired.[3]

9. In a November 30, 2007 letter opinion, the Superior Court determined that Simmons' proffered expert testimony did not comply with the requirements of Section 6853, because: (i) Dr. Zerefos did not "clearly and/or adequately" opine that Bayhealth had deviated from the standard of care, since his opinion was "conditional" upon the jury first determining whether Simmons was or was not alert at the time of the fall, and (ii) the "medical issue" of Simmons' alertness

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[2] Dr. Zerefos also acknowledged other facts which, he agreed, would support Farrell's assessment that Simmons was alert: (i) Simmons was transferred from his bed into a chair without any incidents; (ii) Simmons asked, and insisted to use the bathroom, and arrived at the bathroom without any incidents; and (iii) Simmons told the nurse, after the fall, that his knee was weak and gave out.

[3] According to the Trial Scheduling Order, the deadline for Plaintiff's Rebuttal Expert Report was October 26, 2007. However, the general discovery deadline did not expire until February 15, 2008.

required expert testimony (from Dr. Zerefos or some other expert), which Simmons never submitted or proffered. Accordingly, the trial court granted summary judgment to Bayhealth. This appeal followed.

10. Simmons claims that the Superior Court reversibly erred in granting Bayhealth's summary judgment motion because (contrary to the Superior Court's conclusion) his proffered expert testimony met the statutory requirements of Section 6853, and because no further expert testimony on the issue of "alertness" was legally required. Specifically, Simmons argues that: (i) Dr. Zerefos' opinion that Bayhealth breached its duty of care was not "conditional," but (like all expert opinions) was based on assumed facts, (ii) to the extent the trial court found that Dr. Zerefos' opinion was unclear, the court abused its discretion by not allowing Simmons to clarify or summarize Dr. Zerefos' opinion, and (iii) no expert testimony was required on the issue of Simmons' alertness, because that issue required only an assessment of witness credibility, not a determination of a medical question.

11. We review *de novo* a Superior Court decision granting summary judgment in a malpractice action "to determine whether, viewing the facts in the

light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute."[4]

12. Section 6853 requires that a party alleging medical malpractice must submit expert medical testimony that specifies: (i) the applicable standard of care, (ii) the alleged deviation from that standard, and (iii) the causal link between the deviation and the alleged injury.[5] The Superior Court held that Dr. Zerefos' proposed expert testimony was insufficient to satisfy those requirements, because the proffered testimony failed to opine that Bayhealth had deviated from the standard of care. We disagree.

13. On appeal, this Court evaluates the substance of the proffered expert testimony "as a whole" to determine if it was sufficient to be presented to the jury.[6] In this case, the expert's opinion was contained in both the expert's deposition and in his Affidavit of Merit. Both were made a part of the record. Reading both components of Dr. Zerefos' opinion together ("as a whole"), we find that it

[4] *Green v. Weiner*, 766 A.2d 492, 494 (Del. 2001) (citing *Burkhart v. Davies*, 602 A.2d 56, 58-59 (Del. 1991); *Wagner v. Olmedo*, 365 A.2d 643, 645 (Del. 1976)).

[5] *See Russell v. Kanaga*, 571 A.2d 724, 732 (Del. 1990). 18 *Del. C.* § 6853 relevantly provides:

> (e) No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury […]

[6] *See Barriocanal v. Gibbs*, 697 A.2d 1169, 1172-73 (Del. 1997).

satisfied the "minimal"[7] evidentiary standards of Section 6853, because the expert identified the standard of care and opined that Bayhealth had deviated from it.[8]

14. The standard of care, as articulated by Dr. Zerefos, depends on the existence or non-existence of a critical fact: (i) where a heavy patient with a high or moderate risk of falling *is not alert*, the standard of care requires either two nurses or one male nurse to assist the patient when walking to the bathroom and thereafter when standing up from the toilet; and (ii) where a heavy patient with a high or moderate risk of falling *is alert*, the standard of care does not require that more than one nurse assist the patient. Articulating the standard of care in this manner does not as the Superior Court incorrectly concluded, [9] make the expert testimony "conditional" upon the jury first making a factual determination of whether or not Simmons was alert. The reason is the expert stated his conclusions with respect to

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[7] In *Green v. Weiner*, 766 A.2d at 495-96, this Court held that:

> Section 6853 does not require medical experts to couch their opinions in legal terms or to articulate the standard of care with a high degree of legal precision or with "magic words." Similarly, to survive a motion for judgment as a matter of law, the [plaintiff is] not required to provide uncontradicted evidence of the elements of their negligence claim. Instead, the [plaintiff] must provide credible evidence of each of these elements from which a reasonable jury could find in [his] favor. So long as [the expert]'s testimony provides this minimal evidence, any inconsistencies in [the expert]'s testimony must be resolved by a jury and are thus irrelevant for purposes of ruling on a motion for judgment as a matter of law. (internal citations omitted)

[8] The third element (causation) is not at issue on this appeal.

[9] *Simmons v. Bayhealth Medical Center, Inc.*, C.A. No. 06C-08-136 (Del. Super. November 2007), at 5.

whether or not there was a breach of the duty of care under both alternative scenarios: if Simmons was not alert, then Bayhealth breached its duty of care; if Simmons was alert, then Bayhealth did not breach its duty of care.[10]

15. The Superior Court ruled that, for purposes of deciding the summary judgment motion, it "will accept the plaintiff's suggestion that Dr. Zerefos would opine that the defendant nurse's decision to accompany the plaintiff to and from the commode without additional assistance would be a breach of the standard of care **if** the plaintiff was medically unstable at the time of the transfer." The trial court emphasized, however, that the opinion described "is not clearly and/or adequately stated in Dr. Zerefos' deposition or in the other disclosures of his opinion."[11] If that was the case, then the Superior Court should have allowed Simmons to clarify or summarize Dr. Zerefos' conclusions. The Court's refusal to do so was an abuse of discretion. The trial court denied Simmons' request because the deadline for identifying experts and disclosing their expected opinions had expired. But, relief

[10] There is an explanation for why Dr. Zerefos gave an unqualified opinion in the Affidavit of Merit that Bayhealth had breached its duty of care, while at the deposition, he stated that if, in fact, Simmons was alert, then he could not opine that Bayhealth had deviated from the standard of care. At the time the Affidavit of Merit was filed, Dr. Zerefos could not have been aware of Farrell's (subsequent) testimony that, in her nursing judgment, Simmons was alert. The Progress Note prepared by Farrell shortly after the incident contained no indication as to whether or not, in her nursing judgment, Simmons was alert. Therefore, the affidavit must have been premised on the hypothesis that Simmons was not alert, which was consistent with Simmons' contention and with the expert's own view.

[11] *Simmons v. Bayhealth*, C.A. No. 06C-08-136, at 7 n.12 (emphasis in original).

from that deadline would not have been problematic, because no new testimony was going to be introduced and the general discovery deadline had not yet expired.[12]

16. For these reasons, we find that the Superior Court reversibly erred in holding that Dr. Zerefos' opinion did not comply with the *prima facie* evidentiary requirements of Section 6853, and in granting summary judgment to Bayhealth on that ground.

17. The remaining issue is whether the Superior Court correctly granted summary judgment on the ground that Simmons was required to (but did not) offer expert testimony on the issue of whether Simmons was (or was not) alert at the time he fell. The Superior Court held that expert testimony regarding Simmons' alertness was required, because that was a "medical" issue of fact, and otherwise the jury would have to "make the determination regarding the plaintiff's medical status on its own, unguided by expert testimony."[13]

18. Simmons claims that the issue of his alertness was properly for the jury (not an expert) to decide, because it was a "material issue of fact" that required

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[12] Even though parties must comply with court mandated scheduling orders by identifying expert witnesses and disclosing the substance of their expected opinions within the prescribed deadlines, to avoid manifest injustice, a judge may relieve a party of dates mandated by the scheduling order. *See Sammons v. Doctors for Emergency Services, P.A., et al.*, 913 A.2d 519, 528 n.18 (citing *Fletcher v. Doe*, 2005 WL 1370188, at *1 (Del. Super.)); *Bush v. HMO of Del.*, 702 A.2d 921, 923 (Del. 1997).

[13] *Simmons v. Bayhealth*, C.A. No. 06C-08-136, at 5, 7, 8 (citing *Davis v. Maute*, 770 A.2d 36, 40 (Del. 2001); *Walls v. Cooper*, 1991 WL 247806, at *4 (Del. Supr.); *Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 533 (Del. 1998)).

only an assessment by the jury of which witness to believe—Farrell or Simmons. That was a material fact issue. On the one hand, Nurse Farrell indicated that, in her nursing judgment, she found the patient (Simmons) to be "alert and oriented." Simmons, on the other hand, testified that he did not know what unit of the hospital he was in, how long he had been in the room, whether it was morning, noon or night, or how he got to the bathroom.

19. The Superior Court's conclusion that Simmons' alertness (or non-alertness) was necessarily a subject of expert testimony, was erroneous. In the circumstances of this case, whether or not Simmons was alert was a question "readily amenable to a common sense analysis by a lay person."[14] Nurse Farrell had explained the factors that she relied upon in making her assessment of alertness, and Dr. Zerefos had provided an overview of the facts that would support either determination. Therefore, the jury would not have had to engage in "unguided speculation," as the Superior Court feared. Moreover, on a motion for summary judgment, any uncertainty with respect to alertness should have been resolved in favor of the non-moving party, Simmons.[15] Thus, it would have been appropriate to

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[14] *Walls v. Cooper*, 1991 WL 247806, at *4 (Del. Supr.).

[15] *See Wagner v. Olmedo*, 365 A.2d 643, 645 (Del. 1976) (holding that at the summary judgment stage in a medical malpractice case, "plaintiffs are, of course, entitled ... to the benefit of any inferences"). *See also Russell v. Kanaga*, 571 A.2d 724, 731 (Del. 1990) (observing that the non-moving party is entitled to all reasonable factual inferences from the evidence in the context of a judgment as a matter of law in a medical malpractice case).

conclude, for summary judgment purposes, that there was a triable fact issue as to whether Simmons was alert. Dr. Zerefos opined that if Simmons was not alert, then Bayhealth had breached the applicable standard of care. Therefore, the Superior Court erred in granting summary judgment to Bayhealth on this issue as well.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **REVERSED** and this matter is **REMANDED**. Jurisdiction is not retained.

BY THE COURT:

/s/ Jack B. Jacobs
Justice