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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5941-07T2

LOUISE DETLOFF, as Executrix
of the Estate of Mary Mazzei,

Plaintiff-Appellant,

v.

ABSECON MANOR NURSING CENTER
AND REHABILITATION CENTER,

Defendant-Respondent.

Argued March 30, 2009 - Decided August 4, 2009

Before Judges Lisa and Sapp-Peterson.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-4927-06.

Robert Aaron Greenberg argued the cause for appellant (Aronberg & Kouser, P.A., attorneys; Mr. Greenberg, of counsel and on the brief; Elizabeth Kronisch, on the brief).

William L. Doerler argued the cause for respondent (White and Williams, L.L.P., attorneys; Kevin C. Cottone and Deborah E. Ballantyne, of counsel; Mr. Doerler, on the brief).

PER CURIAM

Plaintiff, Louise Detloff, as executrix of the estate of Mary Mazzei (Mazzei), appeals from the trial court order

granting summary judgment dismissing her complaint alleging negligence, carelessness, and violations of the Omnibus Budget Reconciliation Act (OBRA), 42 U.S.C.A. § 1395i-3; 42 U.S.C.A. 1396r, on the part of defendant, Absecon Manor Nursing Center and Rehabilitation Center (Absecon Manor). In granting summary judgment, the trial court found as "a matter of law, a nurse is not qualified to a render medical opinion with respect to causation" We reverse and remand for trial on all claims except plaintiff's wrongful death claim.

The complaint arises out of the care and treatment defendant provided to plaintiff's decedent while she was admitted at Absecon Manor, a long-term care facility. The facts, when viewed most favorably to plaintiff, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995), reveal that at the time of her admission to Absecon Manor on June 23, 2004, Mazzei was eighty-four years old. She was admitted directly from Atlantic City Medical Center (ACMC) where she had been hospitalized for approximately one week, during which she developed skin tears. The discharge summary reported that Mazzei had a history of falling, which caused previous injuries to her right rib cage and pelvis, osteoporosis, dizziness of unknown etiology, gait disturbance, and chronic anemia. The discharge summary also reported that Mazzei had very poor

stamina and needed assistance for bathing, dressing, walking and toileting.

While admitted to Absecon Manor, Mazzei fell on three occasions, with the third fall occurring on August 17, 2004. On that date, she fell while using a wheelchair to go to the bathroom to self-toilet. She sustained a fractured right hip and was transferred back to ACMC, where she remained for one week. During that admission, hospital records noted that she required maximal assistance to get out of bed, was unable to follow commands, and developed skin tears on her buttocks. She was returned to Absecon Manor on August 24.

The October 3, 2004 records from Absecon Manor note that Mazzei was being treated for a stage II left buttock decubitus ulcer and, by December 21, 2004, the records revealed that she was being treated for bilateral buttocks pressure sores. The records note further that she also developed a pressure sore on her right heel on November 7, and on the left heel five days later.

On March 18, 2005, Mazzei was readmitted to ACMC. Plaintiff's expert's report stated that the admission was due to Mazzei developing "urosepsis and an infected sacral ulcer[,] while defendant's expert report stated the admission was due to Mazzei "develop[ing] mild congestive heart failure" which she

reportedly had developed two months earlier, having a heart rate of 118, and an oxygen level of seventy percent.¹ When discharged approximately one week later, Mazzei was not returned to Absecon Manor. Rather, she was transferred to Greenbriar Nursing Home, where she remained until her death on June 2, 2005.

On June 16, 2006, an eleven-count complaint was filed on behalf of Mazzei, alleging negligence, recklessness, and violations of OBRA on the part of defendant. Two counts of the complaint asserted claims under the Wrongful Death Act, N.J.S.A. 2A:31-1 to -6, and the Survivor Act, N.J.S.A. 2A:15-3. On August 31, 2006, plaintiff filed an affidavit of merit executed by Adrienne Abner, a licensed registered nurse who specializes in wound care nursing and nursing administration. On September 7, 2006, defendant filed its answer, separate defenses and cross-claims. On November 22, 2006, plaintiff filed a consent order executed by the parties confirming that all issues related to the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 to -29, had been appropriately addressed and that there was no need for a case management conference before a pre-trial judge as would be required by Ferriera v. Rancocas Orthopedic Assocs., 178 N.J. 144, 147 (2003).

¹ The actual March 2005 admission record from ACMC is not included in the joint appendix submitted by the parties as part of the record on appeal.

The initial discovery end date for the completion of all pre-trial discovery was fixed at December 2, 2007. In a January 4, 2008 order, that date was extended by the court to April 5, 2008. On March 25, plaintiff's counsel filed a motion to further extend discovery, to which defense counsel consented. The extension was sought because the designated trial counsel had left the firm in January. The newly assigned counsel submitted a certification in support of the motion explaining that in addition to plaintiff's case, he was also responsible for the management of "a number of [other] complex medical and nursing home" cases.

While the discovery extension motion was pending, a notice of trial date generated by the court was issued scheduling the matter for trial on June 23. On April 25, the court entered an order denying the discovery extension request. In its written statement of reasons, the court stated:

In this instance, Plaintiff has failed to file the motion to extend discovery at [a] time so as to have been returnable prior to the setting of arbitration or a trial date. Therefore, Plaintiff must establish exceptional circumstances to permit the relief requested. Although the court sympathizes with counsel['s] situation, Plaintiff has failed to show exceptional circumstances. Counsel certifies that he received this file in January 2008, three (3) months ago, yet there is no explanation for counsel's failure to request an extension of the time for discovery at a

time so as to have been returnable within the original discovery period. In addition, counsel has failed to demonstrate that the discovery sought is essential to the preparation of this case[,], nor has he demonstrated that the circumstances surrounding the failure to move for a discovery extension within the appropriate time were beyond his control. Mere attorney negligence, inadvertence or the pressure of a busy schedule does not amount to exceptional circumstances. O'Donnell v. Ahmed, 363 N.J. Super. 44, 51-52 (Law Div. 2003). Accordingly, Plaintiff's motion to extend the discovery period is denied.

Notwithstanding the denial of plaintiff's motion, the parties continued, voluntarily, to engage in discovery. During the month of May, defendant deposed Mazzei's two daughters. Also in May, defendant moved for summary judgment. Among the reasons defendant urged as a basis for the granting of the motion was that plaintiff failed to provide competent expert testimony establishing causation and damages. Alternatively, defendant argued that plaintiff's expert was statutorily prohibited from rendering a medical diagnosis or providing an opinion as to the cause of an underlying disease. The motion judge, in an oral opinion rendered after oral argument, stated:

The issue before me is quite narrow, and as I've indicated in discussion with counsel, it boils down to the question, the narrow question, of whether, as a matter of law, a nurse is or is not qualified to render a medical diagnosis on a claim such as this. There being no dispute that she is qualified for this purpose anyway, for the

purposes of this motion, there's no dispute that she was qualified and is qualified to render an opinion and has rendered an opinion with respect to the standard of care of the defendant nursing home and its breach thereof. My answer to the question is that, as a matter of law, a nurse is not qualified to render a medical opinion with respect to causation and that, on that basis, the motion to dismiss must be granted. I make no finding with respect to the relative qualifications of the nurse or with respect to whether her opinion is a net opinion or not, as is discussed in the case that I have just referred to; rather, I am satisfied to conclude from the two opinions that I have read and from the statutory language that the plaintiff's claim here must be predicated not only on this kind of testimony with respect to breach, but also a medical opinion from a doctor with respect to medical causation and, lacking that, I am satisfied that the complaint must fail and that the motion for judgment therefore must be granted.

Thereafter, plaintiff moved for reconsideration. Plaintiff argued that defendant waived any objections to the adequacy of the affidavit of merit when it consented to the affidavit of merit filed by Nurse Abner, the opinions expressed by Nurse Abner were well within her particular expertise and were not barred by N.J.S.A. 45:11-23(b). Attached to the motion was an additional expert report prepared by John Kirby, M.D. Although oral argument had been requested, the court denied the motion on the papers, finding that plaintiff merely used the motion "to reargue her position." The present appeal followed.

Plaintiff urges that defendant never challenged the adequacy of Nurse Abner's opinions, and the absence of a Ferreira notice constituted a manifest injustice and extreme prejudice to plaintiff. The trial court framed the issue before it as very narrow, namely, "whether any nurse with [Abner's] qualifications or any other is, in the context of this kind of claim, legally qualified as a matter of law to render a conclusion of medical causation. That's the issue as I perceive it" The court stated further: "This is not a problem with an Affidavit of Merit."

Although the court considered State v. One Marlin Rifle, 319 N.J. Super. 359 (App. Div. 1999), raised by defendant and Kisselbach v. County of Camden, 271 N.J. Super. 558 (App. Div. 1994), raised by plaintiff, the court noted that the issue in One Marlin Rifle, supra, involved whether the opinion expressed by the nurse was a net opinion, 319 N.J. at 369, while Kisselbach, supra, involved a hospital administrator rendering an expert medical opinion. 271 N.J. Super. at 567-68. The court concluded that the holdings in both cases, other than by inference, were not directly helpful to the court. The court was persuaded, however, that the statutory language contained in N.J.S.A. 45:11-23(b) prohibited Nurse Abner's testimony on causation.

We agree with the court's analysis in distinguishing the One Marlin Rifle and Kisselbach cases. We do not, however, reach the same conclusion with respect to its interpretation of N.J.S.A. 45:11-23(b) and reverse on this basis.

Our standard of review of a trial court's grant or denial of a motion for summary judgment is the same as that of the trial court, namely, whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law. Brill, supra, 142 N.J. at 540; Kopin v. Orange Prods., Inc., 297 N.J. Super. 353, 366 (App. Div.), certif. denied, 149 N.J. 409 (1997). Where, as here, we primarily review the trial court's conclusion of law, we accord no deference to the trial court's "interpretation of the law and the legal consequences that flow from established facts" and apply a de novo standard of review. Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995).

N.J.S.A. 45:11-23(b) provides in pertinent part:

The practice of nursing as a registered professional nurse is defined as diagnosing and treating human responses to actual or potential physical and emotional health problems, through such services as casefinding, health teaching, health counseling, and provision of care supportive to or restorative of life and well-being, and executing medical regimens as prescribed by a licensed or otherwise legally authorized physician or dentist. 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 within the scope of practice of the registered professional nurse. Such diagnostic privilege is distinct from a medical diagnosis. Treating means selection and performance of those therapeutic measures essential to the effective management and execution of the nursing regimen. Human responses means those signs, symptoms, and processes which denote the individual's health need or reaction to an actual or potential health problem.

We do not interpret this statute so narrowly as to preclude, in appropriate cases, a nursing opinion on causation. We agree with our colleague's reasoning in One Marlin Rifle, supra, that the wife there, who was a certified clinical nurse specialist and advanced practice nurse in mental health and psychiatric nursing, was not qualified to render an expert opinion on the mental condition of her estranged husband, who opposed the State's forfeiture action following the dismissal of a domestic violence complaint that the wife had filed against him. 319 N.J. at 368. The circumstances here, however, are distinguishable. The motion judge concluded that Nurse Abner was clearly qualified to render an expert opinion on the standard of care to which Mazzei was entitled as a home nursing patient and to also render an opinion that defendant deviated from that standard of care.

In her July 8, 2007 report, Nurse Abner opined:

This lack of appropriate assessments and appropriate fall prevention recommendations on the 8/3, 8/6 and 8/17[//]04 Absecon Manor specific reports provided by the defendant again show that Absecon Manor Nursing and Rehabilitation Center did not meet the standard of care to prevent a fall that resulted in a hip fracture and subsequent pressure ulcers. On the New Jersey Department of Health Reportable Event Record Report that was completed on 8/19/04 detailing the 8/17/04 fall, the plan of care that was in effect and interventions that were in effect prior to the fall were documented. However, the actual implementation of this plan of care cannot be identified in the nurses' notes which are the most appropriate place to document interventions, assessments, re-assessments and effectiveness of interventions that are or were in use at the time of an incident. The documents that have been provided, specifically the incident reports[,] only solidif[y] my position that Absecon Manor Nursing Homes did not meet the standard of care and as a result a fall that Mary Mazzei sustained resulted in a hip fracture and subsequent development of a pressure ulcer.

In her earlier report of September 7, 2006, Nurse Abner opined that the deviations in the standard of nursing care negatively impacted Mazzei's physical health and, thus, the outcome of her care. She specifically addressed two outcomes resulting from the deviations, the fractured hip and the development of what she characterized as "an avoidable pressure ulcer" that Mazzei developed after her August 17, 2004 admission. The specific deviations to which her two reports

referred were directly related to the "provision of care supportive to or restorative of life and well-being."

That Mazzei sustained a fractured hip following a fall and that she developed bed sores are not disputed facts. The opinions reached by Nurse Abner do not require a medical diagnosis. Indeed, it is of common knowledge that the day-to-day care of nursing home residents is generally undertaken not by physicians but by nursing staff such as licensed practical nurses and nursing aides under the supervision of a registered nurse.

The level of involvement of nurses in nursing home care is expressly addressed in regulations promulgated by the Department of Human Services. N.J.A.C. 8:39-25 provides:

8:39-25.1 Mandatory policies and procedures for nurse staffing

(a) There shall be a full-time director of nursing or nursing administrator who is a registered professional nurse licensed in the State of New Jersey, who has at least two years of supervisory experience in providing care to long-term care residents, and who supervises all nursing personnel.

(b) During a temporary absence of the director of nursing, there shall be a registered professional nurse on duty who shall be designated in writing as an alternate to the director of nursing. The alternate shall be temporarily responsible for supervising all nursing personnel.

8:39-25.2 Mandatory nurse staffing
amounts and availability

(a) The facility shall provide nursing services and licensed nursing and ancillary personnel at all times.

Given the scope of nursing care under the direction of a nursing administrator, we are satisfied that N.J.S.A. 45:11-23(b) does not prohibit her testimony on the issue of causation under the particular facts of this case.


We do note, however, that plaintiff has also asserted a claim pursuant to the Wrongful Death Act. Nurse Abner's opinions did not extend to the cause of Mazzei's death, and any attempt to render such an opinion would be beyond the scope of her expertise and prohibited under N.J.S.A. 45:11-23(b). Therefore, the grant of summary judgment as to this claim was proper.

In view of our reversal of the grant of summary judgment, we address the trial court's decision denying plaintiff's motion to extend discovery. Although defendant urges that we should not consider this claim because the orders denying the discovery extension are not identified in the notice of appeal, Campagna v. American Cyanamid Co., 337 N.J. Super. 530, 550 (App. Div.), certif. denied, 168 N.J. 294 (2001), we nonetheless briefly do so in the interest of justice. See Klinsky v. Hanson Van Winkle Manning Co., 43 N.J. Super. 166, 171 (App. Div.), certif.

denied, 20 N.J. 534 (1956) (stating that "[o]ur Supreme Court on many occasions has definitely announced that our rules of practice and procedure are intended to facilitate and promote justice, not to prevent it.")

Based upon our careful review of the record, we are satisfied the trial court did not apply the wrong standard in denying the discovery extension motion. The motion was filed prior to the extended discovery end date but not returnable prior to that date. Rule 4:24-1(c) requires that the "motion for relief shall be filed . . . and made returnable prior to the conclusion of the applicable discovery period." Here, prior to the return date of the motion, a trial date was fixed in the matter. Consequently, the court correctly considered the matter under the "exceptional circumstances" standard. Ibid. Finally, in the certification submitted in support of the motion to further extend discovery, it was never suggested that the extension was needed in order to secure an expert report from a medical doctor.

Reversed in part and affirmed in part. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office

CLERK OF THE APPELLATE DIVISION