

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4635-13T3

ELIZABETH J. SINGER, Representative  
of the Estate of Ruth K. Page, deceased,

Plaintiff-Appellant,

v.

EMERITUS SENIOR LIVING RESIDENCE, d/b/a  
EMERITUS OF PARAMUS and EMERITUS CORPORATION,

Defendants-Respondents.

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Submitted May 19, 2015 – Decided June 1, 2015

Before Judges Fisher and Accurso.

On appeal from Superior Court of New Jersey,  
Law Division, Bergen County, Docket No.  
L-10311-11.

Philip C. Apovian, attorney for appellant.

Burns White, LLC, attorneys for respondents  
(William J. Mundy and Brian D. Pagano, on  
the brief).

PER CURIAM

In this malpractice action, plaintiff Elizabeth J. Singer, representative of the Estate of Ruth K. Page, appeals from the entry of summary judgment dismissing her complaint to recover for injuries the decedent suffered while residing in assisted

living at defendant Emeritus Senior Living Residence. We affirm.

The essential facts are undisputed. The decedent, plaintiff's mother, lived in Arizona. In 2009, after she had been diagnosed with dementia, she moved to New Jersey to be closer to her daughter. The decedent was eighty-nine years old when she became a resident of the Emeritus Senior Living Residence, memory care unit. While living at Emeritus, she suffered a series of falls. Following the last of these falls in December 2009, defendant was hospitalized and subsequently transferred to a nursing home facility where she passed away at ninety. Plaintiff claims that the December 2009 fall, in which the decedent suffered visible injuries to her face, caused a dramatic decline in her cognitive capabilities and hastened her death eight months later.

Following discovery, Emeritus moved for summary judgment contending plaintiff's expert, a board certified psychiatrist, was not qualified to opine on the standard of care for a licensed assisted living facility and not able to opine to a reasonable degree of medical certainty that the fall led to her cognitive decline or hastened her death.

The trial judge agreed. He noted plaintiff's expert, was not "licensed as a nurse. Never went to nursing school. He's

never taken any nursing courses. Never practiced as a nurse. Did not refer to any nursing standard of care while preparing his materials. He's not qualified to render an opinion with respect to nursing care in long term facilities." As to causation, the judge found on the basis of the expert's deposition testimony that his "[o]pinions as to causation he admits are speculative." He concluded,

[f]rom what I have in front of me, I cannot but help grant defendant's motion. He's not qualified to testify. There's no link, there's no causation. He indicates that some of his . . . thoughts and everything they're speculative. That being the case, I'm going to have to grant summary judgment to defendant in this matter.

Plaintiff appeals, raising two issues for our consideration:

POINT I

THE AFFIDAVIT OF MERIT STATUTE WAS MEANT TO WINNOW OUT THE PROFESSIONAL MALPRACTICE CASES WITHOUT MERIT.

POINT II

THE COURT ERRED WHEN IT RELIED ON AN UNPUBLISHED OPINION IN MAKING ITS DECISION.

We find neither of these arguments persuasive.

We review summary judgment using the same standard that governs the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). As the parties agreed on the material

facts for purposes of the motion, our task is limited to determining whether the trial court's ruling on the law was correct. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010) (citing Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998)).

A plaintiff attempting to establish negligence against a licensed professional must present expert testimony to establish "(1) the applicable standard of care; (2) a deviation from that standard; and (3) that the deviation proximately caused the injury." Lanzet v. Greenberg, 126 N.J. 168, 195 (1991) (citations omitted). Having reviewed the summary judgment record, we are satisfied that plaintiff's proofs fell far short of the requirements for a prima facie case. Plaintiff's expert, a board certified psychiatrist, had never worked at an assisted living facility and conceded at deposition that he did not know what the standard of care was for nurses at such a facility. He was also forced to concede that he could not state within a reasonable degree of medical probability whether there was any connection between the decedent's fall in 2009 and her cognitive decline and death eight months later.

Plaintiff argues that having survived a challenge to her expert's qualifications under the Affidavit of Merit Statute,

N.J.S.A. 2A:53A-27, summary judgment should not have been granted. The argument is meritless. The Affidavit of Merit Statute requires a plaintiff to make only a threshold showing that her claims have merit; it is not concerned with whether she can actually prove her claims as is the test under the summary judgment standard. See Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387, 394 (2001).

We also reject as unfounded plaintiff's claim that the trial judge improperly relied on unpublished authority in granting summary judgment. While the judge discussed the unpublished cases brought to his attention by the parties at argument, as allowed by Rule 1:36-3, our review of the record convinces us that he based his ruling on binding precedent and not on unpublished trial court decisions in similar cases.

Because we are satisfied based on the undisputed facts in the summary judgment record that plaintiff did not make out a prima facie case of professional negligence, we affirm the grant of summary judgment.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION