SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5053-15T2

MICHAEL KING, an infant by his g/a/l, CRISTAL KINDER-KING AND WALTER A. KING, JR., and CRISTAL KINDER-KING AND WALTER A. KING, JR., INDIVIDUALLY,

Plaintiffs-Appellants,

v.

KHOSRO DIBADJ, M.D., SAINT BARNABAS MEDICAL CENTER and NEW JERSEY ANESTHESIA ASSOCIATES, PC,[1]

Defendants,

and

LEONARD BACINO,

Defendant-Respondent.

Argued November 29, 2017 – Decided December 27, 2017

Before Judges Fuentes, Koblitz and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-0142-09.

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[1] Bacino is the only remaining defendant because Dr. Dibadj and New Jersey Anesthesia Associates settled with plaintiffs. All claims against Saint Barnabas Medical Center were dismissed.

Tyrone F. Sergio argued the cause for appellants (Stephen S. Weinstein, PA, attorneys; Stephen S. Weinstein and Gail S. Boertzel, on the briefs).

Lauren M. Strollo argued the cause for respondent (Vasios, Kelly & Strollo, PA, attorneys; Lauren M. Strollo, of counsel; Douglas M. Singleterry, on the brief).

PER CURIAM

Infant plaintiff Michael King (MK)[2] appeals from the October 25, 2013 entry of summary judgment in favor of defendant Leonard Bacino, as well as the March 14, 2014 order denying MK's motion for reconsideration. MK suffers from "catastrophic neurological injuries." At issue here is Bacino's liability as a Magnetic Resonance Imaging (MRI) technician at Saint Barnabas Hospital, where MK was administered an MRI that allegedly caused his extensive disability. We affirm the grant of summary judgment to Bacino because MK presented no expert evidence of Bacino's negligence, which was required under these circumstances.

After suffering an accident at home, MK underwent an MRI scan of his brain under intravenous propofol sedation on November 5, 2007. The anesthesiologist, Dr. Khosro Dibadj, administered the propofol to MK. Two MRI technicians, Bacino and Catherine Iodice, were present during the procedure.

[2] We will refer to plaintiffs as MK because his parents' claims are derivative.

The doctor testified during his deposition that he administered the anesthesia, placed the monitors on MK, completed the anesthesia record based on the vital signs during the procedure, and was at all times monitoring MK from the supplementary monitor located in a separate room from the MRI scanner. According to her deposition testimony, Iodice performed the MRI scan, while Bacino was the "free technician," handling paper work and "checking different things." Both Iodice and Bacino have been employed at Saint Barnabas for approximately two decades.

After the scan was completed, MK was transferred to a recovery room. Dr. Dibadj administered oxygen to MK after the infant was removed from the scanner. He then transported MK from the MRI suite to the post-anesthesia care unit, where MK went into cardio-pulmonary arrest. MK was intubated and his circulation restored. He was then transferred to the pediatric intensive care unit.

Lenora Hunter is a radiology nurse employed at Saint Barnabas who was present in the MRI suite after MK's MRI scan. Hunter testified that a normal oxygen saturation level is between 93 percent and 100 percent for adult patients and between 95/96 percent to 100 percent for pediatric patients.

The doctor testified that he was the only one to make entries in the anesthesia record. Bacino testified that he believed MK's saturation levels were inaccurately recorded in the progress

notes, and the anesthesia record, because at one point during the MRI procedure, he noticed the saturation level was below ninety. Bacino was not sure for how long the saturation level fluctuated under ninety, believing it could have been seconds or more. Iodice did not observe MK's oxygen saturation falling at any point during the MRI because she was performing the scan.

Bacino testified that the MRI staff provides the suite and performs the scan. The MRI technicians "assist the anesthesiologist in bringing the child into the room" and "hook up all the monitors that are going to be used during the exam." While the MRI technicians are scanning, in a separate room the anesthesiologist observes the patient and monitors, taking notes.

Plaintiff's liability expert, anesthesiologist Sheldon Deluty, opined that Bacino was liable for MK's injuries. Dr. Deluty reviewed the deposition testimony of Iodice and Bacino and opined that "Saint Barnabas MRI technicians had an independent obligation to inform the attending anesthesiologist of an oxygen saturation [] lower than 90 [percent]." Dr. Deluty concluded:

> Based upon the testimony of the St. Barnabas MRI technicians and my expertise and experience as a board certified anesthesiologist, it is my expert opinion with reasonable medical probability that Mr. Bacino, as the supervising MRI technician who was not actually involved in performing the MRI scan (that was the responsibility of Ms. Iodice), had an independent obligation under the standard of care to make Dr. Dibadj aware

> of the patient's compromised color and decreased oxygen saturation at the time he became aware of these facts. Since Mr. Bacino clearly testified during the course of his deposition that he did not inform Dr. Dibadj of [MK]'s compromised oxygen saturation at the time it occurred, it is my expert opinion with reasonable medical probability that Mr. Bacino departed from accepted standards of care by his failure to inform Dr. Dibadj of the less than 90% oxygen saturation as measured by the pulse oximeter. . . .
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> The above cited departure from accepted standards of care committed by Mr. Leonard Bacino in his capacity as the supervising MRI technician at St. Barnabas Hospital during [MK]'s MRI on November 5, 2007 was a contributing factor leading to [MK] sustaining a cardiopulmonary arrest at St. Barnabas Medical Center on November 5, 2007 and as a direct result, suffering permanent and irreversible hypoxic ischemic encephalopathic injury.

Bacino's expert, Dennis Williaman, one of the lead MRI technologists at Children's Hospital of Pittsburgh, opined that Bacino's conduct conformed with the standard of care of MRI technologists. Williaman reviewed the deposition testimony of Bacino, Dr. Dibadj, Hunter, and MK's mother, as well as the medical records of MK's admission to Saint Barnabas on November 1, 2007. Williaman concluded in his report:

> Assisting the [a]nesthesiologist transport the patient in and out of the scan room, connecting and disconnecting the patient from physiological monitors, performing the procedure that was ordered according to the established departmental protocol is all a standard of care of an MRI technologist. MRI

> [t]echnologist[s] do not choose nor administer sedation medication, we do not enter patients vital signs into the patient chart, and do not decide whether or not a patient is healthy enough to undergo a sedated MRI.

Williaman testified that MRI technologists have no formal training regarding potential complications that a patient under sedation might experience during an MRI. To maintain an MRI technologist license with the American Registry of Radiologic Technologists, technologists are responsible for twenty-four continuing education credits every two years relating to changes and upgrades to the technology of MRI machines.

Williaman stated, "As an MRI technologist, I would not find it reasonable practice to monitor vital signs and express an opinion . . . with no medical training or medical background to a physician [who]'s trained in that area of care and expertise [who] has a much greater knowledge base. . . ."

"We review that legal determination de novo, affording 'no deference to an interpretation of law that flows from established facts.'" Vitale v. Schering-Plough Corp., ____ N.J. ___, ___ (2017) (slip op. at 11-12) (quoting State v. Perini Corp., 221 N.J. 412, 425 (2015)). We "must review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law." Bhagat

v. Bhagat, 217 N.J. 22, 38 (2014). All facts must be viewed in a light most favorable to the non-moving party, "keeping in mind '[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion. . . would require submission of the issue to the trier of fact.'" Schiavo v. Marina Dist. Dev. Co., 442 N.J. Super. 346, 366 (App. Div. 2015) (alteration in original) (quoting R. 4:46-2(c)), certif. denied, 224 N.J. 124 (2016).

The parties do not dispute that MRI technicians are not licensed professionals covered by section 27 of the Affidavit of Merit Act, N.J.S.A. 2A:53A-26 to -29. Rather, MK contends that expert testimony was unnecessary to show that Bacino, after observing MK's oxygen saturation level had fallen below 90 percent, had a duty to communicate this information to Dr. Dibadj. Bacino argues that the common knowledge doctrine is inapplicable because the issue is beyond the ken of the average juror.

A negligence claim in a medical malpractice action must allege "the improper performance of a professional service that deviated from the acceptable standard of care." Zuidema v. Pedicano, 373 N.J. Super. 135, 145 (App. Div. 2004). A plaintiff alleging medical malpractice must prove "(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).

"Absent competent expert proof of these three elements, the case is not sufficient for determination by the jury." Lanzet v. Greenberg, 126 N.J. 168, 195 (1991) (citations omitted). "Experts in negligence cases must establish the actual existence of a standard of care . . . not simply declare their personal preferences or the conduct they wish to encourage . . . ." C.W. v. Cooper Health Sys., 388 N.J. Super. 42, 64 (App. Div. 2006).

Where the "common knowledge" doctrine is applicable, however, expert testimony to establish a deviation from the standard of care is unnecessary. Hubbard v. Reed, 168 N.J. 387, 390 (2001); Bender v. Walgreen E. Co., 399 N.J. Super. 584, 590 (App. Div. 2008). 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 an expert's specialized knowledge. Bender, 399 N.J. Super. at 590. The carelessness of the defendant must be readily apparent to anyone of average intelligence and ordinary experience. Ibid.

Common knowledge cases involve obvious or extreme error. See, e.g. Hubbard, 168 N.J. at 396 (holding defendant dentist pulling the wrong tooth was negligent as a matter of common knowledge);

Palanque v. Lambert-Woolley, 168 N.J. 398, 407-08 (2001) (finding the common knowledge doctrine applied where defendant doctor performed unnecessary surgery because he read the wrong patient's lab report); Bender, 399 N.J. Super. at 590-91 (finding a pharmacist filling a prescription with the wrong drug was subject to the common knowledge exception); Jones v. Stess, 111 N.J. Super. 283, 289-90 (App. Div. 1970) (finding the common knowledge exception applicable where a podiatrist dropped an instrument on the patient's leg resulting in amputation).

We have explained that, "[d]epending upon the identity of a defendant and established hospital protocol or a recognized standard of care, the [common knowledge] doctrine has also been applied where a failure to communicate a patient's known dangerous health condition directly to the treating physician or patient causes a delay in treatment and subsequent harm to the patient." Lucia v. Monmouth Med. Ctr., 341 N.J. Super. 95, 104-05 (App. Div. 2001).

We applied the common knowledge doctrine to the method a radiologist communicated findings concerning a patient in the hospital. Jenoff v. Gleason, 215 N.J. Super. 349, 358 (App. Div. 1987). The issue here is not the method of communication, but whether defendant had a duty to communicate once he saw MK's oxygen saturation level drop below 90 percent.

We held the common knowledge doctrine did not apply where a sonographer recorded a doctor's suggestion for a follow-up study. We held that leaving the sonogram and the noted suggestion with the unit secretary for further review by other doctors fully complied with hospital protocol and the accepted standard of care for sonogram technicians, who had no duty to confirm that the doctor's suggestion was implemented. McKenney v. Jersey City Medical Center, 300 N.J. Super. 568, 591-93 (App. Div. 2000), rev'd on other grounds, 167 N.J. 359 (2001).

In contrast, the common knowledge doctrine did apply where a treating physician did not inform a patient that an x-ray showed a surgical needle had been left in her lung. Tramutola v. Bortone, 118 N.J. Super. 503, 510-14 (App. Div. 1972), rev'd in part on other grounds, 63 N.J. 9 (1973).

This is not a case where "defendant's careless acts are quite obvious" and "a plaintiff need not present expert testimony at trial to establish the standard of care." Palanque, 168 N.J. at 406. Bacino's alleged duty to inform the anesthesiologist when MK's oxygen saturation level fell below 90 percent requires expert testimony, because the responsibilities of an MRI technician as they relate to oxygen saturation levels is not common knowledge.

MK argues that Iodice's lay witness testimony is sufficient to determine the standard of care of an MRI technician.

Alternatively, they rely on Dr. Deluty, the anesthesiologist who also opined on Dr. Dibadj's negligence. Dr. Deluty did not have the expertise to opine on the standard of care of an MRI technician because Dr. Deluty is not himself an MRI technician, does not train MRI technicians, nor know the extent of their required medical background. He derived his MRI technician standard of care from his own personal opinion.

"The test of an expert witness's competency in a malpractice action is whether he or she has sufficient knowledge of professional standards [applicable to the situation under investigation] to justify expression of an opinion." Carey v. Lovett, 132 N.J. 44, 64-65 (1993). Iodice was not an expert witness, nor did she testify unequivocally that it was Bacino's duty as an MRI technician to alert the anesthesiologist of a dip in oxygen saturation. When asked during her deposition why an MRI technician would be responsible to tell the doctor if there is a problem with the oxygen saturation level, Iodice stated "generally we don't because the doctor is a doctor and he's the one that's taking care of the child. You now, it could be maybe a number of reasons why it dropped for a minute and then went back up, you know. Something that happens." As to her understanding of the significance of a drop, Iodice testified, "If it drops below [90 percent] then we would say something. If we see the

anesthesiologist looking and he's not really, you know, worried about it, we kind of don't bring it up to him."

She testified further:

> Q: So if the saturation rate fell [for] two minutes you would then bring it to the doctor's attention?
>
> A: I would just wait to see what the doctor is doing. If he's comfortable with it and it doesn't bother him, I would be comfortable with it. He's the expert; I'm not the expert. He's the anesthesiologist; I'm not.
>
> . . . .
>
> Q: Is it the responsibility of the doctor, the anesthesiologist in this case, to evaluate whether or not a drop in oxygen saturations is of any significance?
>
> A: Yes.
>
> Q: So then would it be fair to say that you don't have to, as a tech, alert the anesthesiologist in this case because he was already looking at both the infant and the monitors in the [MRI] room?
>
> A: Right.

Both parties rely on the New Jersey Department of Environmental Protection, Radiation Protection Element, Bureau of X-Ray Compliance's definition of the "scope of practice" of a diagnostic radiologic technologist:

> The following tasks have been identified within the scope of practice of a licensed diagnostic radiologic technologist: positioning of the patient for a diagnostic radiographic procedure, measuring the

> patient, aligning the x-ray tube to the image receptor, setting tube distance and exposure factors, exercising proper principles of radiation protection and making the exposure.
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> [State of New Jersey, Department of Environmental Protection, Radiation Protection Element, "Diagnostic Radiologic Technology," http://www.nj.gov/dep/rpp/tec/diagrt.htm (last visited December 7, 2017).]

Not only is Iodice not an expert, but, if admitted as expert testimony, her testimony as well as Dr. Deluty's testimony would constitute net opinions. "[I]f an expert cannot offer objective support for his or her opinions, but testifies only to a view about a standard that is personal, it fails because it is a mere net opinion." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 373 (2011). Our Supreme Court has stressed that because of "the weight that a jury may accord to expert testimony, a trial court must ensure that an expert is not permitted to express speculative opinions or personal views that are unfounded in the record." Townsend v. Pierre, 221 N.J. 36, 55 (2015).

Affirmed.