SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1177-20

HOWARD PEPPERMAN, administrator of the estate of MARILYN PEPPERMAN, and HOWARD PEPPERMAN, individually,

Plaintiffs-Appellants,

v.

ROBERT WOOD JOHNSON UNIVERSITY HOSPITAL NEW BRUNSWICK, MARIA BALO, R.N., CRYSTAL MOWEN, R.N., LOREDEL ACOB, R.N., JACK STROH, M.D., SUBHASHINI GOWDA, M.D., CHIU-SHAN LEUNG, R.N., JOSEPHINE LAZO, R.N., DANIEL SHEEHAN, R.N., TODD SMITH, R.N., and BARBARA TINDALL, R.N.,

Defendants-Respondents,

and

NEW BRUNSWICK CARDIOLOGY GROUP, P.A.,

Defendants.

Argued November 3, 2021 – Decided November 17, 2021

Before Judges Fisher and Smith.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-6623-18.

Christina Vassiliou Harvey argued the cause for appellants (Lomurro, Munson, Comer, Brown & Schottland, LLC, attorneys; Jonathan H. Lomurro, of counsel and on the briefs; Alan J. Weinberg, on the briefs).

Raymond J. Fleming argued the cause for respondents (Rosenberg Jacobs Heller & Fleming, PC, attorneys; Raymond J. Fleming, of counsel and on the brief; Christopher Klabonski, on the brief).

PER CURIAM

Plaintiff asserted in this action that eighty-one-year-old Marilyn Pepperman fell from an operating table during a medical procedure at Robert Wood Johnson University Hospital. She died a few months later for unrelated reasons. After eighteen months of discovery, plaintiff moved for summary judgment, seeking a shifting of the burden of proof to defendants – the hospital, as well as the physicians and nurses, involved in the dual-chamber pacemaker procedure – under the principles outlined in Anderson v. Somberg, 67 N.J. 291

(1975). Defendants opposed that motion and cross-moved for summary judgment, arguing, among other things, that plaintiff's lack of a medical expert, who could opine that the complained-of injuries resulted from the alleged fall instead of other circumstances, precluded the action's further maintenance. The judge granted defendants' motion, and plaintiff appeals, arguing:

> I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AS THE CROSS-MOTION WAS IMPROPER AND WAS NOT RELATED TO THE SUBJECT OF PLAINTIFF'S MOTION TO SHIFT THE BURDEN OF PROOF PURSUANT TO ANDERSON V. SOMBERG.
>
> II. THE TRIAL COURT ERRED IN RULING THAT EXPERT TESTIMONY WAS NEEDED TO LINK PLAINTIFF'S INJURIES TO THE FALL AND FAILED TO GIVE PLAINTIFF ALL REASONABLE INFERENCES FROM THE EVIDENCE ON DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT.
>
> III. THE TRIAL COURT ERRED IN REQUIRING PLAINTIFF TO APPORTION DAMAGES CAUSED BY PRE-EXISTING INJURIES AND DAMAGES CAUSED BY DEFENDANTS' NEGLIGENCE.

We find insufficient merit in plaintiff's first point to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).[1] We reject plaintiff's other arguments for the reasons that follow.

The record presented by the parties' competing summary judgment motions reveals certain things that are either undisputed or were provided by plaintiff, namely that, on November 26, 2017:

- Marilyn was found unconscious in her home.
- Howard "slapped her on the face" in an attempt to revive her;
- he performed CPR, which brought Marilyn back to consciousness;
- Marilyn was transported to Robert Wood Johnson Hospital in New Brunswick;
- while at the hospital, Marilyn again lost consciousness;
- hospital staff revived Marilyn after performing CRP for about eight minutes; and

[1] Rule 1:6-3(b) requires that a cross-motion must "relat[e] to the subject matter of the original motion" so that the original movant is not short-changed in the time to respond to a motion. Plaintiff did not object when filing a response to the cross-motion – he only objected on the return date – and, more importantly, he has not shown that his ability to fully respond to the cross-motion was impaired by the lack of sufficient notice. Even assuming defendants' summary judgment motion did not relate to the subject matter of plaintiff's Anderson v. Somberg motion, the argument still exalts form over substance.

- the next day, Marilyn underwent a dual chamber pacemaker procedure that took approximately four hours.

The remaining relevant facts are disputed. Before the procedure was concluded, a technician was called in to take chest x-rays while Marilyn was still unconscious. While sliding an x-ray plate underneath Marilyn, the technician felt a "shift[] towards the left side of the table," and immediately asked for assistance from nurses. According to the technician, they conducted a "controlled descent" of Marilyn's body from the table to the floor at Dr. Gowda's suggestion.

Plaintiff asserts that Marilyn fell from the operating table – and wasn't lowered by a controlled descent – and that the occurrence was a result of negligence of those present. His claim that Marilyn fell from the table was based on a hospital chaplain's report, which stated that "the patient had fallen off the table," and on Dr. Subhashini Gowda's statement to him that "she caught [his] wife coming down off the table" when describing what occurred during the procedure. Like the trial judge, in applying the Brill standard,[2] we assume the truth of plaintiff's version that Marilyn fell from the table.

[2] Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

The record also reveals that x-rays were taken of Marilyn's chest both before and after the procedure; a CT scan was also taken after the procedure. The x-rays arguably show that Marilyn did not have any fractured ribs before the procedure but had "multiple bilateral non-displaced rib fractures" a few days after the procedure. Plaintiff claims – without any support of a medical expert – that these fractures resulted from the alleged fall.

The defense retained a radiology expert – Dr. Adam Hecht – to review the x-rays. He stated that the rib fractures were not visible on the pre-procedure x-rays because "it is extremely difficult, if not impossible, to appreciate a non-displaced rib fracture on a portable ICU chest x-ray" and concluded that these x-rays were not conclusive about when or how the fractures occurred. Dr. Hecht also stated that the CT scan after the procedure showed a "common fracture pattern following CPR in an elderly patient" and that the fractures were likely the result of the eight minutes of CPR performed the day before the procedure. He explained that the "force, and the degree of chest compression, is considerable" when performing CPR, and it is understood in the field that "rib fractures are a common unintended consequence" of the procedure, especially in older patients "whose bones are brittle." He added that injuries of this nature would be inconsistent with the controlled descent described during the

pacemaker procedure. Dr. Hecht concluded, within a reasonable degree of medical certainty, that Marilyn's rib fractures "were not caused by the controlled 'fall' in the interventional suite."

When discovery was complete, plaintiff moved for summary judgment, seeking to shift the burden of proof to defendants pursuant to Anderson. Defendants cross-moved, seeking summary judgment on the ground that the evidence one-sidedly revealed that Marilyn did not fall to the floor as asserted and that plaintiff did not provide any medical expert opinion that would link her injuries to the alleged "fall." The judge ruled in defendants' favor and later denied plaintiff's reconsideration motion.

As noted above, we assume, as plaintiff argues, that Marilyn fell from the operating table. That at best means she was entitled to the benefit of a shifting of the burden to those in the operating room to demonstrate they were not negligent. Anderson, 67 N.J. at 302. That does not mean plaintiff was entitled to an assumption that all her later physical complaints about rib fractures, chest pains, or a facial bruise were caused by the fall. That is, Anderson does not shift the burden to defendants to show what injuries were or were not either caused or aggravated by the fall; it only relieves an unconscious patient from proving the negligence of those around her when some presumptively negligent act

occurred. Id. at 298. Even if Anderson applied here – a question we need not decide – plaintiff remained obligated to prove that whatever injuries Marilyn complained of were caused by the fall and not by some other force.

This is particularly true when considering the surrounding circumstances. There is no dispute that within a very short time before the fall, both plaintiff and hospital staff performed CPR on Marilyn. Dr. Hecht has asserted that for someone of Marilyn's age the type of rib fractures revealed in the x-rays and CT scan are common. To the extent there is evidence that Marilyn complained of chest pains after the fall, plaintiff has provided nothing to link those complaints to the fall instead of the CPR or the surgery itself. No jury should be permitted to speculate – without the assistance of expert testimony – that any fractures or chest pains resulting from one force instead of another. See, e.g., Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997).

Plaintiff lastly argues the alleged bruise to Marilyn's face demonstrates an injury resulting from the fall that is not reasonably connected to any other force. This is not so. Plaintiff testified at this deposition that when he was called to the

room where Marilyn laid unconscious, he "slapped her on the face."[3] Because of that evidence, the jury could not have been allowed to speculate that the bruise came from the fall instead of the slap. Plaintiff also argues that because the facial bruise logically arose only from the fall, its existence permits a factual finding that her other injuries also resulted from the fall. Because we reject its premise, we find no merit in this argument. Moreover, even if we assumed the premise that the facial bruise could only have been caused by the fall is correct, it does not logically follow that this provides a nexus – that need not be supported by medical testimony – for all Marilyn's other injuries.[4]

In light of the particular factual circumstances presented in this case, we conclude that the trial judge correctly granted summary judgment dismissing the complaint.

Affirmed.

[3] Defendants also refer to evidence that suggested an oxygen mask was placed on Marilyn by police responding to the home after plaintiff conducted CPR on Marilyn as another potential cause of the bruise.

[4] If we could interpret the competing evidence as suggesting a facial bruise that was logically caused by no other force than the fall from the operating table, it would leave plaintiff with a claim for damages regarding only the facial bruise. Because, however, there is evidence to suggest at least one other cause for the bruise, plaintiff cannot pursue even that limited claim without medical testimony linking it to the fall.