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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2493-20**

**RYAN KENT,**

**Plaintiff-Respondent,**

**v.**

**NUVASIVE, INC., NUVASIVE  
CLINICAL ASSOCIATES,  
AMERICAN NEURO-  
MONITORING ASSOCIATES,  
IMPULSE MONITORING, INC.,  
SHAWN MASIA, M.D., SHAWN  
L. MASIA, M.D., PC, and DEAN  
GIACOBBE, M.D.,**

**Defendants-Respondents,**

**and**

**KAYE GRIFFIN, R. EP T., CNIM,**

**Defendant-Appellant,**

**and**

**SAINT PETER'S ADVANCED  
CARE, PC, NAYAN KOTHARI,  
M.D., JEFFREY GREENBERG,  
M.D., WILLIAM LOWE, M.D.,**

CHRISTOPHER KOLASSA, M.D.,  
NIRANJAN RAO, M.D., SAINT  
PETER'S UNIVERSITY  
HOSPITAL, SAINT PETER'S  
HEALTHCARE SYSTEM,  
SAINT PETER'S PHYSICIAN  
ASSOCIATES, ORTHOPEDIC  
CENTER OF NEW JERSEY,  
MARC MALBERG, M.D.,  
CHRISTOPHER CARUSO, M.D.,  
JEAN-PHILIPPE BOCAGE, M.D.,  
ASHOK DESAI, M.D., JAMES  
GERVASONI, M.D., and EMILY  
RUSSO, RN,

Defendants.

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Argued on January 18, 2022 – Decided February 16, 2022

Before Judges Messano, Rose and Enright.

On appeal from the Superior Court of New Jersey, Law  
Division, Middlesex County, Docket No. L-1470-17.

Christopher R. Carton argued the cause for appellant  
(Bowman and Brooke LLP, attorneys; Christopher R.  
Carton, Erica S. Mekles and Olga Tymouch (Bowman  
and Brooke LLP) of the Minnesota bar, admitted pro  
hac vice, on the briefs).

Jeffrey W. Moryan argued the cause for respondents  
NuVasive, Inc., NuVasive Clinical Services  
Monitoring, Inc., American Neuromonitoring  
Associates, Shawn Masia, M.D., and Shawn L. Masia,  
M.D., PC (Connell Foley LLP, attorneys; Jeffrey W.  
Moryan, on the brief).

Michael R. Ricciardulli argued the cause for respondent Dean Giacobbe, M.D. (Ruprecht Hart Ricciardulli & Sherman, LLP, attorneys; Michael R. Ricciardulli, of counsel and on the brief; Patricia E. Voorhis, on the brief).

## PER CURIAM

On leave granted, defendant Kaye Griffin appeals from a January 21, 2021 trial court order barring her expert's testimony at trial, resulting in dismissal of Griffin's crossclaim against co-defendant Dean Giacobbe, M.D., and a March 17, 2021 order denying her motion for reconsideration. Because Griffin's expert was denied the opportunity to explain his opinions either at deposition or a hearing pursuant to N.J.R.E. 104, we are constrained to reverse and remand this matter for further proceedings.

### I.

This appeal has its genesis in a medical malpractice action filed by plaintiff Ryan Kent, which alleged his spinal cord was damaged during surgery for a kyphotic spine, rendering him paralyzed below the waist. Pertinent to this appeal, plaintiff sued the surgeon, Marc I. Malberg, M.D.; the anesthesiologist, Dean Giacobbe, M.D.; the neurologist, Shawn L. Masia, M.D., and his practice;<sup>1</sup>

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<sup>1</sup> According to their responding brief, these entities are: NuVasive, Inc.; NuVasive Clinical Services Monitoring, Inc., formerly known as Impulse

and the neuromonitoring technician, Kaye Griffin, R. EP T., CNIM. Plaintiff's complaint also named St. Peter's University Hospital and its related entities,<sup>2</sup> and other medical professionals allegedly involved in the mishandled surgery. Plaintiff has since settled his claims with Dr. Malberg. As of the filing of this appeal and relevant to the issues raised by Griffin, plaintiff's action against Griffin, Dr. Masia, and NuVasive was still pending.

The crux of plaintiff's claims against Griffin concerns her alleged failure to report the loss of neuromonitoring signals that occurred during the surgery. We summarize the facts underscoring that allegation from the motion record in a light most favorable to Griffin as the non-moving party. See R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

As he had done in various previous surgeries, Dr. Malberg requested intraoperative neurophysiological monitoring (IONM), which enabled him to detect any neurological changes while performing plaintiff's procedure. Dr. Masia – the neurologist – was not physically present in the operating room; he

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Monitoring, Inc.; American Neuromonitoring Associates, P.C.; and Shawn L. Masia, M.D., P.C. (collectively, NuVasive defendants).

<sup>2</sup> According to Griffin's merits brief, these entities are St. Peter's Healthcare System, St. Peter's Physician Associates, and St. Peter's Advanced Care, P.C. They are not parties to this appeal.

remotely monitored the surgery and communicated his interpretations of the neuromonitoring data to Griffin via an instant messaging chat log. Griffin, who physically attended the surgery, acted as the liaison between Dr. Masia, and Drs. Malberg and Giacobbe. Griffin estimated she had performed IONM for Dr. Malberg in "close to a thousand cases" in the thirteen-year period prior to plaintiff's surgery, and during that timeframe they had developed a "rapport."

When deposed, Dr. Giacobbe acknowledged he checked with Griffin every fifteen minutes or so to ensure the signals remained unchanged. Griffin claimed after Dr. Malberg inserted the implant into plaintiff's thoracic spine, Dr. Masia advised her of an attenuation of signals, which she then reported to Drs. Malberg and Giacobbe. Conversely, Drs. Malberg and Giacobbe testified Griffin made no such assertion during the surgery.

During the discovery process, plaintiff served sixteen expert reports, none of which asserted negligence against Dr. Giacobbe, whose ensuing summary judgment motion was unopposed by plaintiff and all parties, save for Griffin. The motion judge granted Dr. Giacobbe's motion, dismissing plaintiff's complaint and all crossclaims against him, except for those asserted by Griffin.<sup>3</sup>

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<sup>3</sup> The order also preserved Griffin's crossclaims against co-defendant Ashok Desai, M.D., whose status in the litigation is unclear from the record provided on appeal. Dr. Desai is not a party to this appeal.

Thereafter, Griffin provided the September 27, 2020 report of Lorne B. Sheren, M.D., her standard-of-care expert. According to Dr. Sheren: "There was no lack of communication during the case between Ms. Griffin and Dr. Giacobbe." Noting Dr. Giacobbe asked Griffin every fifteen minutes whether there was "any alteration in the waveforms," Dr. Sheren opined "in all probability, Dr. Giacobbe was aware of the changes in the monitoring parameters." Dr. Sheren elaborated, in pertinent part:

Dr. Giacobbe would have no control over the actual surgery. Proper placement of any hardware was the responsibility of Dr. Malberg. However, when Dr. Giacobbe became aware of the deterioration of signals associated with the insertion of hardware, he had a duty to make sure Dr. Malberg was aware of this change. The decision to modify the surgical procedure would have solely been Dr. Malberg's, but Dr. Giacobbe would have had the duty to make sure the surgeon was aware of this important finding. Dr. Giacobbe was the only attending physician in the operating room other than Dr. Malberg. Although we would like to believe that all members of the operating team have an equal opportunity to voice their opinions, a warning from a peer level physician would carry more weight than [the] same warning delivered by a technician. Again, hypothetically, had Dr. Giacobbe ascertained that Dr. Malberg was aware of the signal changes, he would have fulfilled his duty to plaintiff.

In October 2020, Dr. Giacobbe moved to bar Dr. Sheren's report, asserting the expert failed to set forth a legally cognizable opinion regarding the

appropriate standard of care; Dr. Giacobbe's deviation from such standard of care; or a causal connection between any such deviation and plaintiff's injuries. Dr. Giacobbe concurrently moved for summary judgment. Notably, Dr. Sheren was not deposed.

As part of her submission opposing the motion, Griffin included Dr. Sheren's November 24, 2020 supplemental report. Although he reiterated much of his initial report, Dr. Sheren further opined in his experience "there is a hierarchy of information in the operating room. . . . Thus[,] direct communication from Dr. Giacobbe to Dr. Malberg would have bolstered the importance of [the loss of neuromonitoring signals] and was an essential component in the standard of care." Maintaining Dr. Giacobbe's failure to convey the signal changes to Dr. Malberg "was a departure from the standard of care," Dr. Sheren opined, "[h]ad this standard of care been met[,] Dr. Malberg contends he could have immediately modified his surgical procedure." Dr. Sheren amplified his initial conclusion, stating: "Based upon my decades of experience as a [b]oard [c]ertified anesthesiologist, the standard of care for an anesthesiologist includes the continuous intra[]operative medical assessment of his patient. This standard was not met in this case."

Following oral argument, the motion judge reserved decision and thereafter issued a written statement of reasons, accompanying the court's January 21, 2021 order. Acknowledging Dr. Sheren's "experience and credentials are lengthy and impressive," the judge determined the expert's report<sup>4</sup> in this case expressed "a net opinion." The judge was persuaded that Dr. Sheren's opinion was not based on the record evidence. Instead, "Dr. Sheren essentially ignored the portion of Griffin's testimony that she told Dr. Malberg of the signal changes (and that he acknowledged them), but accepted the portion of her testimony that she told Dr. Giacobbe about the signal changes." Concluding Griffin "failed to present sufficient expert testimony to establish the relevant standard of care, or Dr. Giacobbe's deviation from that standard," the judge barred Dr. Sheren's testimony and granted summary judgment, dismissing Griffin's crossclaim. The judge did not reach Dr. Giacobbe's additional contention that Dr. Sheren failed to establish causation.

In her motion for reconsideration, Griffin sought a hearing pursuant to N.J.R.E. 104 to address the judge's "fundamental misunderstanding of Dr.

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<sup>4</sup> The motion judge's decision references the report served by Griffin on October 5, 2020, which we presume was Dr. Sheren's September 27, 2020 initial report. It is unclear from the record whether the judge considered the expert's supplemental report dated November 24, 2020.



Sheren's intended testimony." A different judge denied Griffin's motion, concluding Dr. Sheren's report expressed "his own subjective opinion regarding an alleged 'hierarchy of information in the operating room.'" The judge found no basis to conduct a hearing.

On appeal, Griffin contends both motion judges abused their discretion by barring Dr. Sheren's testimony as net opinion based solely on his report, without the benefit of a deposition or evidentiary hearing. Griffin claims her expert's reports "disclosed the 'why and wherefore' of his opinion," which she maintains "is fully supported by the evidence and Dr. Sheren's experience, training, and education." The NuVasive defendants join Griffin in urging us to reverse the trial court's orders.<sup>5</sup>

## II.

We review a ruling on a summary judgment motion under the same standard that governed the trial judge. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and

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<sup>5</sup> Because the NuVasive defendants did not oppose Dr. Giacobbe's motion before the trial court, ordinarily we would not consider their position on this appeal. See Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954). However, because Dr. Giacobbe raised no objection to their appearance on appeal, we have considered the NuVasive defendants' contentions.

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); Brill, 142 N.J. at 528-29. "When, as in this case, a trial court is 'confronted with an evidence determination precedent to ruling on a summary judgment motion,' it 'squarely must address the evidence decision first.'" Townsend v. Pierre, 221 N.J. 36, 53 (2015) (quoting Estate of Hanges v. Metro. Prop. & Cas. Ins., 202 N.J. 369, 384-85 (2010)). An appellate court's "review of the trial court's decisions proceeds in the same sequence, with the evidentiary issue resolved first, followed by the summary judgment determination of the trial court." Ibid.

Generally, traditional negligence principles apply to a medical malpractice case. Verdicchio v. Ricca, 179 N.J. 1, 23 (2004). "In a medical malpractice action, the plaintiff has the burden of proving the relevant standard of care governing the defendant[], a deviation from that standard, an injury proximately caused by the deviation, and damages suffered from the defendant[s] negligence." Smith v. Datla, 451 N.J. Super. 82, 102 (App. Div. 2017) (quoting Komlodi v. Picciano, 217 N.J. 387, 409 (2014)).

"The admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Townsend, 221 N.J. at 52. We therefore

accord deference to the trial court's grant of a motion to strike expert testimony, "reviewing it against an abuse of discretion standard." Id. at 52-53.

Expert testimony is admissible in the following circumstances:

"(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art that such an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony."

[DeHanes v. Rothman, 158 N.J. 90, 100 (1999) (quoting State v. Kelly, 97 N.J. 178, 208 (1984)).]

Our analysis also is guided by N.J.R.E. 702 and N.J.R.E. 703. The former establishes when expert testimony is permissible and requires the expert be qualified in his or her respective field. The latter requires "expert opinion be grounded in 'facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts.'" Townsend, 221 N.J. at 53 (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)).

"The net opinion rule is a 'corollary of [N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" Id. at 53-54 (alterations in original) (quoting

Polzo, 196 N.J. at 583). Therefore, an expert is required to "'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Id. at 54 (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)). Pursuant to the net opinion rule, experts must "'be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable.'" Id. at 55 (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992)).

Thus, "[t]he net opinion rule is succinctly defined as 'a prohibition against speculative testimony.'" Harte v. Hand, 433 N.J. Super. 457, 465 (App. Div. 2013) (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997)). This results because a speculating expert "ceases to be an aid to the trier of fact and becomes nothing more than an additional juror," Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996), affording no benefit to the fact finder, see N.J.R.E. 702.

However, our Supreme Court has warned against barring an expert's testimony based solely upon the expert's report, particularly if doing so will be dispositive of a case, when the expert has not had an opportunity to explain his or her opinions through testimony. Kemp ex rel. Wright v. State, 174 N.J. 412, 432-33 (2002) (finding plain error where the trial court failed to conduct an

evidentiary hearing even though the parties had not requested an N.J.R.E. 104 hearing). Further, although an expert witness generally is confined to the opinions contained in his or her report provided in discovery, Conrad v. Robbi, 341 N.J. Super. 424, 440-41 (App. Div. 2001), "the logical predicates for and conclusions from statements made in the report are not foreclosed," McCalla v. Harnischfeger Corp., 215 N.J. Super. 160, 171 (App. Div. 1987). As the Court reiterated in Kemp, the trial court's role during an N.J.R.E. 104 hearing is to "determine whether the expert's opinion is derived from a sound and well-founded methodology that is supported by some expert consensus in the appropriate field." 174 N.J. at 427 (quoting Landrigan, 127 N.J. at 417).

In view of these legal principles, we conclude the trial court prematurely barred Dr. Sheren's testimony as net opinion here, where the expert's findings were not tested at deposition or an N.J.R.E. 104 evidentiary hearing. This is especially so in this case where summary judgment flowed from the barring of Dr. Sheren's report. See id. at 432-33.

Dr. Sheren's supplemental report arguably sets forth at least some foundation for his standard-of-care opinion, citing the depth of his experience in the field of anesthesiology. Notably, Dr. Giacobbe did not challenge Dr. Sheren's experience or his qualifications. An expert's conclusions can be based

on his or her personal experience and qualifications, without citation to academic literature. See State v. Townsend, 186 N.J. 473, 495 (2006) (allowing opinion testimony based on the expert's "education, training, and most importantly, her experience"); Rosenberg v. Tavorath, 352 N.J. Super. 385, 403 (App. Div. 2002) ("Evidential support for an expert opinion is not limited to treatises or any type of documentary support, but may include what the witness has learned from personal experience.").

In his November 24, 2020 supplemental report, Dr. Sheren opined based on his experience that communication during surgery is subject to "a hierarchy of information." Noting Griffin was a technician and Dr. Giacobbe was the only other physician in the operating room, Dr. Sheren opined Dr. Giacobbe had departed from the standard of care by not ensuring Dr. Malberg acknowledged Griffin's communication concerning the loss of neuromonitoring signals. According to Dr. Sheren, "direct communication from Dr. Giacobbe to Dr. Malberg would have bolstered" the technician's communication to the surgeon.

As he did before the trial court, Dr. Giacobbe argues Dr. Sheren's opinion is speculative and only personal in nature. Dr. Giacobbe contends Griffin's alleged warning to Dr. Malberg neither was inadequate in view of her self-described "rapport" with Dr. Malberg during their years of working together in

the operating room, nor did it impose an independent duty on Dr. Giacobbe to ensure Dr. Malberg considered Griffin's claimed warning. Stated another way, Dr. Giacobbe argues Dr. Sheren's opinion imposes a subjective duty on the anesthesiologist – as the only other physician in the room – to act as liaison between the virtually-present neurologist and the surgeon. Further, Dr. Giacobbe argues Dr. Sheren's report assumes the truth of Griffin's account, i.e., that she told Drs. Malberg and Giacobbe about the loss of signals, while ignoring her testimony that Dr. Malberg "acknowledged and understood the communication."

While we recognize the shortcomings of Dr. Sheren's report, the expert was not afforded an opportunity to explain his opinion, nor were his findings subjected to cross-examination. "An expert's proposed testimony should not be excluded merely 'because it fails to account for some particular condition or fact which the adversary considers relevant.'" Townsend, 221 N.J. at 54 (quoting Creanga v. Jardal, 185 N.J. 345, 360 (2005)). Although Dr. Sheren's opinion certainly may be subject to attack on cross-examination for not including other meaningful considerations, the absence of competing testimony does not make his opinion net. See Rosenberg, 352 N.J. Super. at 402.

Accordingly, we conclude: the motion judge abused his discretion by finding Dr. Sheren ignored certain aspects of Griffin's testimony while crediting her statements that supported his opinion, and prematurely concluding the expert's opinion was net; and the second motion judge on reconsideration erred in not granting an evidentiary hearing to test Dr. Sheren's opinion. We therefore remand the matter for a hearing pursuant to N.J.R.E. 104. At the conclusion of testimony, the trial court shall reconsider Dr. Giacobbe's motions and any additional arguments, including lack of causation, an issue not reached by the trial court. In remanding this matter, we do not suggest a preferred result.

Reversed and remanded, we do not retain jurisdiction.

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



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