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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0480-21

ELIZABETH JOHNSON,

Plaintiff-Appellant,

v.

CARE ONE AT TEANECK,

Defendant-Respondent.

Argued May 2, 2023 – Decided May 12, 2023

Before Judges Geiger, Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-6745-17.

Raphael G. Jacobs argued the cause for appellant (Mueller Law Group, attorneys; Raphael G. Jacobs, on the briefs).

Anthony Cocca argued the cause for respondent (Cocca & Cutinello, LLP, attorneys; Anthony Cocca and Katelyn E. Cutinello, of counsel and on the brief).

PER CURIAM

In this nursing home malpractice case, plaintiff Elizabeth Johnson appeals from a Law Division order that granted summary judgment to defendant Care One at Teaneck (Care One), dismissing her complaint with prejudice. We affirm.

We take the following facts from the summary judgment record, viewing them in the light most favorable to plaintiffs. See Richter v. Oakland Bd. of Educ., 246 N.J. 507, 515 (2021).

Plaintiff was seventy-nine years old when she was admitted to Care One on October 7, 2015, for short-term rehabilitation after her stay at Englewood Hospital for a urinary tract infection. The plan was for plaintiff to be discharged to home and return to the adult day care center once rehabilitation was completed.

At the time of her admission to Care One, plaintiff was assessed as a fall risk. She used a walker and wheelchair for mobility, and was noted as unsteady, requiring assistance and supervision for standing, transfers, and walking. Plaintiff fell in August 2015, and risked falling again if she attempted to toilet herself. The Risperidone and Remeron medications she was prescribed had side effects of sedation and dizziness.

Care One's care plan for plaintiff included fall preventions. It stated that plaintiff required assistance when standing and ambulating, needed articles placed within reach, and a bed sensor alarm. The care plan did not include a defined perimeter (high edge) mattress, low-height bed, mats at bedside, or non-skid socks, which would have reduced the risk of falling.

Plaintiff was seen by physicians, including her attending physician, rehabilitation medicine, a psychiatrist, and a dentist, a total of nine times during her sixteen-day admission at Care One.

On October 21, 2015, a nurse discovered injuries on plaintiff's head and face. Visible injuries included a black eye, facial swelling, and a bump on her head. Neurological checks were normal. No falls were noted on plaintiff's charts during prior shifts on October 20 or 21, 2015.

Plaintiff was discharged from Care One on October 23, 2015, after a computerized tomography (CT) scan of her head revealed no acute injuries. Englewood Hospital records indicated plaintiff had a lump/bruise on her forehead, bruise on the side of her face, a black eye, and a bruise on her head.

Care One initiated a "fall investigation" and "accident/incident investigation" to review the incident. The results of these confidential

investigations were not disclosed to plaintiff during discovery. Plaintiff did not move to compel their production.

Plaintiff retained Barbara Darlington, RN, BSN, MS, a registered nurse and licensed nursing home administrator, as her standard-of-care expert. During her deposition, Darlington acknowledged that plaintiff's injury was of unknown origin. Darlington further acknowledged that it was not known whether plaintiff had fallen or was the victim of abuse. Plaintiff herself did not recall the cause of her injuries.

Darlington opined that the standard of care required bed and chair alarms, a defined perimeter mattress, non-skid socks, placing a patient at the nurse's station, a low bed, and floor mats, but acknowledged these measures would not prevent all falls or injury. Darlington noted that while a bed alarm was ordered, the nursing staff failed to check it was in place and operational during the two days leading up to plaintiff's injuries. Darlington opined that due to the failure of Care One's staff to plan and implement standard of care interventions for fall prevention, plaintiff "most likely suffered an avoidable fall with significant injury."

Plaintiff retained Nirav Shah, M.D., a board-certified neurosurgeon, as her causation and damages expert. In his report, Dr. Shah stated that plaintiff was

"noted fall risk" and "sustained a head injury of unknown origin while a resident at Care One on October 21, 2015." He further noted that her prior hospitalization was for a urinary tract infection and that she was discharged after completing a course of antibiotics.

As to Care One, Dr. Shah noted plaintiff "was admitted for cognitive loss and dementia" and had Alzheimer's disease and difficulty walking. The Gallen Adult Day Health Care's records indicated that plaintiff was recommended for physical therapy, referred for nutrition consultation, and encouraged to continue wound care.

Dr. Shah's report stated that while at Care One, plaintiff wore a "[l]eft wrist WanderGuard"[1] and ambulated with handheld assist due to poor safety awareness and balance. A "right wrist WanderGuard" was in place and functioning. Therapy was recommended under twenty-four-hour supervision. She was seen by a psychiatrist who prescribed Depakote. Plaintiff was oriented with forgetfulness and confusion at times.

Dr. Shah reviewed the CT scan imaging studies. He noted the October 2015 CT head scan indicated no acute intracranial process and age-appropriate

[1] A WanderGuard bracelet sends an alert to caregivers when an at-risk resident gets close to a monitored door.

atrophy. The May 2017 CT scan indicated: (a) no intracranial abnormality but chronic ischemic changes; (b) mild ventriculomegaly; (c) bilateral ischemic changes; (d) old left posterior cerebral infarct, not seen previously; and (e) diffuse cerebral atrophy. An August 2017 electroencephalogram was "abnormal due to the presence of mild generalized slowing."

Dr. Shah opined that plaintiff suffered a concussion-related traumatic brain injury on October 21, 2015, resulting in hospitalization. "The October 2015 CT head [scan], on personal view, showed no acute hemorrhage or stroke, but was still consistent with post-concussive syndrome. This process occurs on a cellular scale due to the sheering injury to the brain from trauma, relatively invisible on [i]maging." Dr. Shah opined that plaintiff's "neurological decline began and persisted due to the traumatic brain injury sustained in October 2015." During his deposition, Dr. Shah acknowledged he did not know the origin of plaintiff's head injury or whether a fall occurred.

On October 5, 2017, plaintiff filed a three-count complaint against Care One. The first count alleged professional negligence in the treatment of plaintiff, stating that Care One, individually and vicariously through its nurses, staff, employees, and medical personnel:

> failed to properly appreciate the condition of the plaintiff, failed to heed the signs and symptoms that

> plaintiff was exhibiting, failed to properly assess the plaintiff, failed to put in place a proper care plan for the plaintiff, failed to provide adequate and qualified staff to care for plaintiff, failed to implement proper treatment of the plaintiff, failed to meet the standard of care in providing treatment to the plaintiff, failed to provide care to the plaintiff pursuant to proper policies and procedures, and failed to meet applicable state and federal regulations, statutes and rules governing the defendants' care of the plaintiff.

The second count alleged Care One directly and vicariously "violated federal statutes, codes, rules and regulations which establish the minimum standard of care to be followed . . . in the care of patients like the plaintiff, including but not limited to, sections of Title 42 of the U.S.C. and C.F.R. relating to proper treatment of the plaintiff." The third count alleged Care One violated the Nursing Home Responsibilities and Residents' Rights Act, N.J.S.A. 30:13-1 to -17, which establishes the minimum standard of care to be provided, and asserted claims for attorney's fees, costs, and punitive damages.

On May 4, 2018, defendant filed an answer and separate defenses. Discovery ensued thereafter. Plaintiff produced two standard-of-care reports by Darlington, and a causation and damages report by Dr. Shah.

Defendant filed a Rule 4:6-2(e) motion to dismiss certain claims in plaintiff's complaint for failure to state a claim upon which relief can be granted. On April 9, 2020, the court granted the motion in part. The court dismissed part

of paragraph four of the first count and the entire second count of plaintiff's complaint that alleged defendant violated federal statutes, codes, rules, and regulations, including but not limited to 42 U.S.C. and federal regulations, "relating to the care and treatment of plaintiff . . . as separate causes of action" but stated those alleged violations "may be admitted as evidence based on the sound discretion of the trial judge on the question of professional negligence." The court denied dismissal of the third count without prejudice, which alleged defendant violated the Nursing Home Responsibilities and Residents' Rights Act. The court also denied dismissal of plaintiff's claim for punitive damages in the third count, stating that claim is "left to the sound discretion of the trial court based on the evidence adduced at trial."

Following extensive discovery and discovery-related motion practice, Care One moved for summary judgment dismissing plaintiff's remaining claims. On August 27, 2021, the court issued an order and oral decision granting the motion. The court reasoned:

> There is no question of fact for the jury here to decide, since there is no evidence that the [p]laintiff fell at Care One or how she became injured at Care One. Here, we have an expert, Nurse [Da]rlington, because this is a malpractice case, who speculates about how and where and when a fall may have occurred but it's just a rank net opinion at this point.

> There are a lot of ways that the face can get injured and whether it was done by self or was it done by family member or was it done by a hospital member as assault or whether it was a fall, there's no expert testimony to determine that. So at this point, we have speculation that someone, including another patient, could have struck the [p]laintiff.
>
> Again, the law is clear. The fact that there may have been standards of things that the [d]efendant could have or should have done is of no moment when we don't know what the causation of the injury to begin with was.
>
> In order to support a causal connection between the act complained of and the resulting injury of damage, the expert must identify the factual basis for his or her conclusions, explaining his or her reasoning or methodology and demonstrate that both are reliable in terms of generally accepted objective standards of practice, not merely standards personal to the expert, see [Creanga v. Jardal,] 185 N.J. [345, 360 (2005)] and Riley [v. Keenan,] 406 N.J. Super 281, 295-96 [(App. Div. 2005)].
>
> Additionally, there's certainly no admissible evidence in the record, provided to the [c]ourt, of how . . . the injury occurred. The jury is left to speculate to the extent and to the exact circumstances surrounding the [p]laintiff's injury, which it cannot do, see Germann [v. Matriss, 55 N.J. 193, 208 (1970)].

The court noted that the complaint was filed on April 24, 2018, discovery ended on January 30, 2021, and trial was scheduled for January 10, 2022, yet no one could state how plaintiff was injured. The court explained that strict liability

did not apply, and Care One could not be found liability based on speculation. This appeal followed.

Plaintiff raises two points for our consideration:

> I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS THE COMPLAINT BECAUSE THE DISPUTED ISSUES OF MATERIAL FACT SHOULD HAVE BEEN SUBMITTED TO A JURY FOR DETERMINATION.
>
> II. THE TRIAL COURT ERRED IN FINDING THAT A JURY COULD NOT REASONABLY CONCLUDE THAT PLAINTIFF'S INJURIES WERE THE RESULT OF A FALL FROM HER BED DUE TO THE NEGLIGENCE OF DEFENDANT.

We review a grant of summary judgment "de novo and apply the same standard as the trial court." Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021). Summary judgment will be granted when "the competent evidential materials submitted by the parties," viewed in the light most favorable to the non-moving party, show there are no "genuine issues of material fact," and that "the moving party is entitled to summary judgment as a matter of law." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 23-24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). We must give the non-moving party "the benefit of the most favorable evidence and most favorable inferences drawn from that evidence." Est. of Narleski v. Gomes, 244 N.J. 199, 205 (2020) (quoting Gormley v. Wood-

El, 218 N.J. 72, 86 (2014)). We owe no special deference to the motion judge's legal analysis. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018).

Legal questions dependent upon the operative facts should not be decided by summary judgment when those facts are in dispute. Cent. Paper Distrib. Servs. v. Int'l Rec. Storage and Retrieval Serv., Inc., 325 N.J. Super. 225, 232 (App. Div. 1999). When deciding a summary judgment motion, the trial court's function is not "to weigh the evidence and determine the outcome but only to decide if a material dispute of fact exist[s]." Gilhooley v. Cnty. of Union, 164 N.J. 533, 545 (2000). Accordingly, a "motion for summary judgment should be denied when determination of material disputed facts depends primarily on credibility evaluations or when the existence of a genuine issue of material fact appears from discovery materials or from the pleadings and affidavits on the motion." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.3.2 on R. 4:46-2 (2023) (citing Parks v. Rogers, 176 N.J. 491, 502 (2003)).

Plaintiff concedes there is no direct evidence that plaintiff fell from her bed but contends there is sufficient evidence from which a jury could reasonably infer that plaintiff fell from her bed because of Care One's negligence. Plaintiff points to the following material facts:

1. Plaintiff was at high risk for falling.

2. A defined perimeter mattress with high sides, designed to minimize the risk of falls, was not used.

3. A thick pad alongside the bed, to reduce the severity of injury to plaintiff in a fall, was not used.

4. A low bed was not provided.

5. Plaintiff was not given non-skid socks.

6. Plaintiff required assistance in walking.

7. Plaintiff sustained a bruise, black eye, and head trauma sufficient to cause a concussion.

8. Care One initiated a fall investigation, the results of which have not been disclosed.

9. There is no evidence that plaintiff had any visitors other than her son during her stay at Care One.

10. There is no evidence that plaintiff wandered into another patient's room.

11. There is no evidence that another patient came into plaintiff's room.

12. Plaintiff had no history of self-inflicted harm.

13. The nurse whose shift started at 7:00 a.m. discovered the injury "around 10:00 a.m."

14. The nurse on duty during the preceding 11:00 p.m. to 7:00 a.m. shift did not report any injury to plaintiff.

Plaintiff points out that juries may rely on circumstantial evidence and draw reasonable inferences from the evidence. Darlington opined that Care One's failure to implement fall prevention interventions deviated from the standard of care. Plaintiff argues that "a jury relying on these facts in evidence could reasonably infer that a fall from the bed was the most likely cause of [plaintiff's] injuries" which "resulted from Care One's failure to provide preventative and mitigating measures to protect" plaintiff, without engaging in improper speculation.

Care One argues that plaintiff acknowledges that neither of her experts can "say with absolute certainty that plaintiff's injuries were caused by a fall," that plaintiff "has no direct evidence plaintiff fell from her bed due to the negligence of Care One," and "there is no direct evidence of her falling out of the bed." Thus,

> there was no evidence to establish how plaintiff's injury occurred, including whether she fell, and if she fell, how, where and when the fall occurred. There also was no causal link between any alleged deviation from the standard of care with respect to fall precautions and [plaintiff's] injuries, so that plaintiffs experts presented only net opinions. Under these circumstances, a jury would be left to engage in mere conjecture or speculation as to how [plaintiff's] head injury occurred.

Accordingly, Care One argues that plaintiff cannot prove by expert testimony that the alleged deviation from the standard of care was the proximate cause of plaintiff's injuries. Care One contends that plaintiff is unable to present evidence which affords a reasonable basis for the conclusion it is more likely than not that Care one's conduct was a cause in fact of the result.

"A jury question as to defendant's liability is not presented simply by the introduction of some evidence of negligence. There must be evidence or reasonable inferences therefrom showing a proximate causal relation between defendant's negligence, if found by the jury, and [the plaintiff's injury]." Germann v. Matriss, 55 N.J. 193, 205 (1970). Plaintiff has "the burden of establishing facts showing" the deviation from the standard of care "was the reasonably probable cause" of the injuries. Id. at 208.

Our careful review of the record reveals it is barren of competent evidence showing how plaintiff's injury occurred. The jury would be left to impermissibly speculate on the precise circumstances surrounding plaintiff's injuries. See id. at 208-09 (explaining that it is error to allow a jury to decide whether the negligence of the defendant was the proximate cause of plaintiff's injury based on mere conjecture or speculation). Absent a certification or testimony from plaintiff or another witness based on personal knowledge or other admissible

evidence of how the injury occurred, the jury would be required to provide its own theory on how plaintiff's injury came about, rather than weighing competent, credible evidence and arriving at an evidentially based conclusion.

Even assuming there was a breach of the standard of care in that Care One did not properly implement a fall prevention plan, the court cannot conclude there were genuine issues of fact regarding causation, as there is no competent evidence in the record indicating that plaintiff did in fact fall. There are no admissible facts regarding how plaintiff was injured. Considering the record, the possibility that plaintiff's injuries were caused by another scenario, such as walking into an object, is just as likely. Ordinarily, negligence must be proven by the plaintiff and is never presumed. Buckelew v. Grossbard, 87 N.J. 512, 525 (1981) (citing Hansen v. Eagle-Picher Lead Co., 8 N.J. 133, 139 (1951)); see also Schueler v. Strelinger, 43 N.J. 330, 344 (1964) (recognizing that because a poor result may occur with good treatment, a health care provider is not necessarily liable "for bad results that may follow"). The mere fact that plaintiff was injured is insufficient for a finding of medical negligence.

"To establish a prima facie case of negligence in a medical malpractice action, a plaintiff usually must present expert testimony to establish the relevant standard of care, the [medical provider's] breach of that standard, and a causal

connection between the breach and the plaintiff's injuries." Rosenberg v. Tavorath, 352 N.J. Super. 385, 399 (App. Div. 2002) (citing Est. of Chin v. St. Barnabas Med. Ctr., 160 N.J. 454, 469 (1999)). "Absent competent expert proof of these three elements, the case is not sufficient for determination by the jury." Ibid. (citing Sanzari v. Rosenfeld, 34 N.J. 128, 134-35 (1961); Parker v. Goldstein, 78 N.J. Super. 472, 484 (App. Div. 1963)).

While plaintiff presented expert testimony regarding Care One's alleged breach of the standard of care, the record is devoid of any evidence as to where, when, or how plaintiff suffered the facial and head injuries. Plaintiff has not presented any evidence showing that an act or omission by Care One caused her injuries or that an act or omission, combined with some other cause, increased the risk of injury so that Care One's conduct was a substantial factor in bringing about her injuries. See Evers v. Dollinger, 95 N.J. 399, 414-15 (1984); Model Jury Charges (Civil), 5.50A, "Duty and Negligence" (approved Mar. 2002).

To defeat summary judgment, plaintiff cannot simply rest on a theory for which she has provided no evidence. See Puder v. Buechel, 183 N.J. 428, 440-41 (2005). In opposing Care One's motion for summary judgment, plaintiff made only conclusory assertions as to causation, without presenting any evidence to support where, when, or how plaintiff sustained her hip injuries.

Without such evidence, plaintiff failed to demonstrate a genuine issue of material fact sufficient to defeat summary judgment.

Put simply, there is no evidence establishing that plaintiff fell, much less that she fell as a result of any negligence attributable to Care One. Darlington testified that plaintiff's injury was of unknown origin. Darlington further testified that the fall prevention measures required by the standard of care would not prevent all falls or injuries. Similarly, Dr. Shah testified that he did not know the origin of plaintiff's head injuries or whether she fell at Care One. Plaintiff did not recall what happened. This is not a res ipsa loquitor or common knowledge case. Proximate causation cannot be presumed or left to conjecture and speculation by the jury. See Germann, 55 N.J. at 208. For these reasons, summary judgment dismissing plaintiff's complaint was appropriate.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION