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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3331-20**

GEORGE SHAMY, Administrator
of the Estate of DEANNA D.
SHAMY, and GEORGE SHAMY,
individually,

Plaintiffs-Appellants,

v.

EDDIE GAMAO, M.D.,

Defendant,

and

STELTON PHARMACY,
DEVINE PHARMACY,
WALGREEN EASTERN CO.,
INC.,¹ and NEW JERSEY CVS
PHARMACY, LLC,²

Defendants-Respondents.

Argued December 19, 2022 – Decided October 20, 2023

¹ Incorrectly pled as Walgreen Pharmacy.

² Incorrectly pled as CVS Pharmacy.

Before Judges Haas, DeAlmeida and Mitterhoff.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-8025-19.

James D. Martin argued the cause for appellants (Martin Kane & Kuper LLC, attorneys; James D. Martin, on the briefs).

William Bloom argued the cause for respondent Stelton Pharmacy (Methfessel & Werbel, attorneys; William Bloom, of counsel and on the brief; Nabila Saeed, on the brief).

George W. Boyle argued the cause for respondent Devine Pharmacy (Ronan, Tuzzio & Giannone, attorneys; Gregory W. Boyle, on the brief).

Timothy P. Smith argued the cause for respondent Walgreen Eastern Co., Inc. (Kinney Lisovicz Reilly & Wolff, PC, attorneys; James P. Lisovicz, of counsel and on the brief; Timothy P. Smith and Julia Talarick, on the brief).

Peter L. Korn argued the cause for respondent New Jersey CVS Pharmacy, LLC (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Peter L. Korn, of counsel and on the brief; William S. Mezzomo, on the brief).

The opinion of the court was delivered by

DeALMEIDA, J.A.D.

Plaintiff George Shamy was the father of Deanna D. Shamy.³ In 2017, Deanna died from an overdose of prescription medications. Two years after her death, George, individually and as administrator of Deanna's estate, sued four pharmacies he alleged negligently filled Deanna's prescriptions for addictive medications and controlled dangerous substances (CDS) far in excess of reasonable practices. George alleged the pharmacies' malpractice in filling Deanna's prescriptions, despite knowing she had been overly and carelessly prescribed addictive medications, exacerbated the risk of harm posed by her preexisting addiction, which resulted in her death. George appeals from four orders of the Law Division granting summary judgment to the pharmacies.

We reverse. We conclude the trial court erred when it applied: (1) the learned intermediary doctrine to preclude George's malpractice claims; and (2) the incorrect proximate cause standard to conclude that one of the pharmacies was entitled to summary judgment even if the claims against it were not barred.

I.

It is not disputed that on November 29, 2017, Deanna died as a result of acute intoxication from Oxycodone, a prescription pain medication, and

³ Because George and Deanna shared a surname, we will refer to them by their first names. We intend no disrespect.

Alprazolam, a prescription anti-anxiety medication commonly known as Xanax. Cachexia, a wasting disorder resulting in extreme weight loss, contributed to her death. The medications on which Deanna overdosed were prescribed to her by defendant Eddie Gamao, who was then a physician licensed to practice medicine in New Jersey. Evidence gathered at the scene of Deanna's death included multiple rolled-up dollar bills and straws covered with a white powdery substance. Police also found hundreds of prescription bottles for medications prescribed for Deanna by Gamao, as well as approximately 200 Fentanyl patches that Gamao prescribed for her.

On November 27, 2019, George, acting in his individual capacity and as administrator of Deanna's estate, filed a complaint in the Law Division. He named as defendants Gamao and four retail pharmacies: defendants Stelton Pharmacy (Stelton), Devine Pharmacy (Devine), Walgreen Eastern Co., Inc. (Walgreen), and New Jersey CVS Pharmacy, LLC (CVS).

George alleged that beginning in 2010, Gamao negligently and carelessly prescribed medications and CDS to Deanna in amounts and with a frequency exceeding reasonable medical practices. As a result, George alleged, Deanna was rendered dependent on prescription medications and CDS. George alleged Gamao's acts subjected Deanna to physical, mental, and emotional pain,

suffering, and, ultimately, death. George alleged that Gamao's acts departed from the standard of care in the practice of medicine and were willful, wanton, reckless and/or grossly negligent.

George also alleged that the four pharmacies filled prescriptions obtained by Deanna from Gamao that they knew or should have known were negligently, carelessly and/or recklessly prescribed, given their amount and frequency. George alleged the pharmacies' acts departed from the standard of care for pharmacies, and constituted malpractice, which subjected Deanna to physical, mental, and emotional pain, suffering, and, ultimately, her death.

George sought compensatory damages from the defendants under a theory of malpractice and strict liability for the illegal marketing and distribution of CDS under the New Jersey Survivor Act, N.J.S.A. 2A:15-3, and the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1. He also sought punitive damages, attorney's fees, interest, and costs of suit.

George later executed a stipulation of dismissal of the claims alleged against Gamao. In addition, George conceded that his claims under the Survivor Act were time barred and agreed to their dismissal.

A. Walmart's Summary Judgment Motion.

After nearly a year of discovery, but approximately four months before the discovery end date, Walgreen moved for summary judgment. It submitted evidence establishing that it filled Deanna's prescriptions for Oxycodone only from January 11, 2011 to March 26, 2013, four years and eight months before her death. According to Walgreen, prior to filling Deanna's Oxycodone prescriptions, it confirmed in Deanna's prescription profile that Gamao had prescribed the medication for chronic intractable pain and chronic back pain syndrome. Deanna had a history of a fall from a horse in 2002 and car accidents in 2005 and 2012. Gamao diagnosed her with chronic body/back pain, fibromyalgia, herniated cervical and lumbar discs, and torn medial meniscus. Walgreen never filled a prescription for Deanne for Xanax.

Walgreen also established that Deanna was treated for addiction to opioids and Xanax before and during 2010, prior to Walgreen having filled her Oxycodone prescriptions. In addition, Deanna was prescribed Oxycodone by Winifred Leung, M.D., on August 2, 2010, prior to Walgreen having filled Deanna's prescriptions from Gamao. On July 29, 2011, Deanna was treated at Carrier Clinic for opioid and Xanax abuse, as well as detoxification. At that time, she reported that her opioid and Xanax abuse had been daily for over two years. Deanna's family was aware of her addiction.

Deanne also was treated by Patrick Gainey, M.D., who prescribed Oxycodone for her on March 26, 2013. Walgreen did not fill that prescription. On April 19, 2013, Deanne presented a prescription for Oxycodone to a Walgreen pharmacy, but the pharmacy did not fill that prescription.

Walgreen argued that George's claims: (1) are barred by the learned intermediary doctrine; and (2) cannot be established because George cannot prove Walgreen's acts were the proximate cause of Deanna's suffering and death. In support of its proximate cause argument, Walgreen pointed out, among other things, that it had only filled Oxycodone prescriptions for Deanna, but the cause of her death was a combination of Oxycodone and Xanax, and that Deanna developed her addiction before Walgreen had filled any prescriptions for her.

George opposed the motion, but did not dispute the facts established in Walgreen's moving papers. The trial court, therefore, deemed those facts admitted. George argued that the learned intermediary doctrine does not apply because he does not allege a product liability or failure to warn claim. Instead, George argued, he alleges Walgreen committed malpractice by not noticing that Gamao was overprescribing addictive medications and CDS to Deanna and taking action not to fill the prescriptions she presented to them.

George also argued that it was premature to consider proximate cause because discovery was not complete and, if considered, the "modified proximate causation standard" set forth in Evers v. Dollinger, 95 N.J. 399 (1984), and Scafidi v. Seiler, 119 N.J. 93 (1990), applies because Deanna had a preexisting condition – an addiction to opiates – and Walgreen's negligence amplified the risk of harm from that condition and was a substantial factor in the resulting suffering and death.

On January 26, 2021, the trial court issued an order granting Walgreen's motion. In a statement of reasons accompanying the order, the court found that "the learned intermediary doctrine applies. Dr. Gamao was in the best position to act in the best interest of the decedent." The court did not cite any legal precedents or findings of fact on which it relied for this conclusion.

The court also found "there is no genuine issue of material fact as to whether [George] can establish proximate cause." Without citing a legal precedent explaining the proximate causation standard it applied, the court reasoned that

[t]he pharmacists' function was to verify the validity of the prescriptions and dispense the same. [George's] claim that Walgreen's conduct prevented decedent from getting help is contrary to the evidence. Decedent was treated at a rehabilitation facility and sought psychiatric

assistance during the time period Walgreen filled the decedent's prescriptions.

Lastly, based on the medical examiner's cause of death, which was the combination of [O]xycodone and [A]lprazolam, there is nothing indicated to this [c]ourt that Walgreen dispensed [A]lprazolam.

The only precedent cited in the court's statement is an unpublished opinion of this court, which the trial court found inapplicable to George's claims.⁴

George subsequently moved for leave to appeal the trial court's summary judgment order. We denied the motion.

George also moved for an extension of the discovery deadline. The trial court granted that motion, setting a discovery end date of May 19, 2021.

B. CVS's Motion for Summary Judgment.

On April 23, 2021, prior to the close of discovery, CVS moved for summary judgment on the same basis as Walgreen. CVS established that it first filled a prescription for Deanna on July 31, 2009. That prescription was for Clonazepam, an anti-convulsant. The bulk of the remaining prescriptions CVS filled were in 2012 to 2014. The last time that CVS dispensed medication to

⁴ See R. 1:36-3 ("Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court.").

Deanna, for Oxycodone and Xanax, was on May 15, 2014, more than three and a half years prior to her death.

C. Devine's Cross-Motion for Summary Judgment.

On April 23, 2021, prior to the close of discovery, Devine cross-moved for summary judgment on the same basis as Walgreen and CVS. Devine established that it filled prescriptions written by Gamao for Deanna for Xanax from June 25, 2011 to June 5, 2015. Devine last filled Deanna's Xanax prescription on June 5, 2015, almost two and a half years prior to her death. Devine did not fill any prescriptions for Oxycodone for Deanna.

D. Stelton's Motion for Summary Judgment.

On May 5, 2021, prior to the close of discovery, Stelton moved for summary judgment on the same basis as Walgreen, CVS, and Devine. Stelton filled prescriptions written for Deanne by Gamao for Oxycodone from April 22, 2013 to November 20, 2017, a little more than a week prior to her death. Stelton also filled prescriptions written for Deanne by Gamao for Fentanyl in July 2015.

On June 11, 2021, the trial court granted summary judgment in favor of CVS, Devine, and Stelton. These motions were decided by a different judge than the judge who decided Walgreen's motion. In an oral opinion, the judge concluded that the first judge's decision applying the learned intermediary

doctrine to bar George's claims against Walgreen was the law of the case. Finding no basis on which to depart from the first judge's decision, the second judge applied the doctrine to grant summary judgment to the three pharmacies. The court did not mention the proximate causation standard in its opinion. Three June 11, 2021 orders memorialize the trial court's decisions.

This appeal follows. George challenges the four orders granting summary judgment to the pharmacy defendants. He argues that the trial court: (1) mistakenly applied the learned intermediary doctrine to bar his claims; (2) employed the incorrect proximate causation standard to the claims against Walgreen; (3) erred in its application of the law of the case doctrine to the CVS, Devin, and Stelton motions; and (4) erred by granting summary judgment prior to the close of discovery.

II.

We review the trial court's decision granting summary judgment de novo, using "the same standard that governs trial courts in reviewing summary judgment orders." Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998). Rule 4:46-2(c) provides that a court should grant summary judgment when "the pleadings, depositions, answers to interrogatories and 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." "Thus, the movant must show that there does not exist a 'genuine issue' as to a material fact and not simply one 'of an insubstantial nature'; a non-movant will be unsuccessful 'merely by pointing to any fact in dispute.'" Prudential, 307 N.J. Super. at 167. We review the record "based on our consideration of the evidence in the light most favorable to the parties opposing summary judgment." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995).

A. The Learned Intermediary Doctrine.

"With respect to drugs and medical devices, our state law has adopted the 'learned intermediary' doctrine, under which 'a pharmaceutical manufacturer generally discharges its duty to warn the ultimate user of prescription drugs by supplying physicians with information about the drug's dangerous propensities.'" Hrymoc v. Ethicon, Inc., 467 N.J. Super. 42, 85 (App. Div. 2021) (quoting Perez v. Wyeth Labs., Inc., 161 N.J. 1, 10 (1999)). "This doctrine 'recognizes that a prescribing doctor has the primary responsibility of advising the patient of the risks and benefits of taking a particular medication.'" Ibid. (quoting In re Accutane Litig., 235 N.J. 229, 239 (2018)). "Thus, 'it is the physician's responsibility to pass on to the parties the information that enables

the patient to use the product safely." Ibid. (quoting Niemiera by Niemiera v. Schneider, 114 N.J. 550, 565-66 (1989)).

The doctrine is codified at N.J.S.A. 2A:58C-4, which provides, in relevant part:

In any product liability action the manufacturer or seller shall not be liable for harm caused by a failure to warn if the product contains an adequate warning or instruction or, in the case of dangers a manufacturer or seller discovers or reasonably should discover after the product leaves its control, if the manufacturer or seller provides an adequate warning or instruction. An adequate product warning or instruction is one that a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicates adequate information on the dangers and safe use of the product, taking into account the characteristics of, and the ordinary knowledge common to, the person by whom the product is intended to be used, or in the case of prescription drugs, taking into account the characteristics of, and the ordinary knowledge common to, the prescribing physician. If the warning or instruction given in connection with a drug . . . has been approved or prescribed by the federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U.S.C. § 301 et seq. or the "Public Health Service Act," 58 Stat. 682, 42 U.S.C. § 201 et seq., a rebuttable presumption shall arise that the warning or instruction is adequate.

The rationale behind the doctrine is that the prescribing physician, acting as a learned intermediary between the manufacturer and the patient as the product

consumer, is in the best position to relay to the patient the warnings of the pharmaceutical manufacturer.

George does not dispute the doctrine applies to pharmacies that accurately fill prescriptions written by physicians in amounts and at frequencies within reasonable medical standards. See e.g., In re Rezulin Prod. Liab. Litig., 133 F. Supp. 2d 272, 288 (S.D.N.Y. 2001) (extending learned intermediary doctrine to pharmacy where plaintiffs alleged failure to warn of intrinsic dangers of prescription drugs); Schaerrer v. Stewart's Plaza Pharmacy, Inc., 79 P.3d 922, 929 (Utah 2003) (same).

As explained in Nichols v. Central Merchandise, Inc., 817 P.2d 1131, 1133 (Kan. App. 1991),

[b]ecause the decision to prescribe a specific drug involves an analysis of the patient's unique condition and a balancing of the risks and benefits of a given drug, the cases extending the learned intermediary doctrine to pharmacists reason that imposing a duty to warn on the pharmacist would intrude on the doctor-patient relationship and would force the pharmacist to practice medicine without a license.

The court continued,

"The pharmacist still has a duty to accurately fill a prescription and to be alert for clear errors or mistakes in the prescription. The pharmacist does not, however, have a duty to question a judgment made by the physician as to the propriety of a prescription or to warn

customers of the hazardous side effects associated with a drug, either orally or by way of the manufacturer's package insert."

[Ibid. (quoting McKee v. Am. Home Prods., 782 P.2d 1045, 1056 (Wash. 1989) (citation omitted)).]

George argues, however, that the learned intermediary doctrine is inapplicable to his claims because he does not allege either product liability or a failure to warn Deanna about the inherent dangers of the prescription medications and CDSs dispensed to her by the pharmacy defendants. Instead, George alleges that the pharmacies engaged in professional malpractice by not noticing that the amount and frequency of Gamao's prescriptions for Deanna for addictive medications and CDS was outside reasonable practices and refusing to fill those prescriptions. We agree that George's professional malpractice claims are sufficiently distinct from product liability and failure to warn claims to preclude application of the learned intermediary doctrine to bar their consideration.

In addition, we are not persuaded by the pharmacies' arguments that George's professional malpractice claims are barred by a provision of the Product Liability Act (PLA), N.J.S.A. 2A:58C-1(b)(3), which precludes common-law negligence actions for bodily injuries caused by a product. The PLA "is the exclusive remedy for a personal injury claim arising out of product

use," negating common law actions for injuries caused by a defective product. Koruba v. Am. Honda Motor Co., 396 N.J. Super. 517, 531 (App. Div. 2007). George's claims are not predicated on Deanna's use of a defective product, the inherent characteristics of the medications and CDS dispensed to Deanna, or a failure to warn her about the side effects of a product. He seeks damages arising from the pharmacies' alleged malpractice, which, he contends, exacerbated the risk of harm from Deanna's preexisting drug addiction, and ultimately resulted in her suffering and death.

Thus, it was error to preclude consideration of George's claims under the learned intermediary doctrine. The record, however, is insufficient for us to determine whether the pharmacy defendants are entitled to summary judgment on his malpractice claims. Because the trial court applied the learned intermediary doctrine to bar George's claims, it did not define the contours of the standard of care the pharmacy defendants owed Deanna and whether genuine issues of material fact exist with respect to whether they deviated from that standard. We leave those decisions to the trial court in the first instance.

In a professional negligence case, the plaintiff must establish that the defendant deviated from an accepted standard of care and the deviation was the proximate cause of the harm suffered by the plaintiff. Germann v. Matris, 55

N.J. 193, 205 (1970). In support of his argument that the pharmacies deviated from the standard of care they owed to Deanna, George relies, in part, on State Board of Pharmacy regulations that impose on pharmacists certain obligations prior to dispensing medication. N.J.A.C. 13:39-7.20 provides:

(a) Upon receipt of a new or refill prescription, a pharmacist shall examine the patient's profile record before dispensing the medication, to determine the possibility of a potentially significant drug interaction, reaction or misutilization of the prescription. Upon determining a potentially significant drug interaction, reaction or misutilization, the pharmacists shall take the appropriate action to avoid or minimize the problem, which shall, if necessary, including consultation with the patient and/or the practitioner.

(b) Upon receipt of a refill prescription, a pharmacist shall determine if a substantial time, as is appropriate for that drug in the pharmacist's professional judgment, has elapsed from the last filling. When necessary, the pharmacist shall consult with the practitioner and/or the patient to ensure that continued use of the medication is appropriate.

(c) When patient profile records indicate sporadic, erratic or irrational use of medication by a patient, the pharmacist shall consult with the patient and/or the practitioner to determine if continued use of the medication is appropriate.

In addition,

[t]he pharmacist shall have the right to refuse to fill a prescription if, in his or her professional judgment, the prescription is outside the scope of practice of the

practitioner; or if the pharmacist has sufficient reason to question the validity or the prescription; or to protect the health and welfare of the patient.

[N.J.A.C. 13:39-7.13.]

George argues pharmacists have a legal obligation to make the inquiries outlined in these regulations to ensure that medications are being dispensed properly. He argues that deviations from those obligations by the pharmacy defendants, if proven, would constitute indicia of malpractice.

He also relies, in part, on the prescription monitoring program established by the enactment of N.J.S.A. 45:1-45 to -52, effective November 1, 2015. According to George, if proven, failure by the pharmacy defendants to utilize the statutory program, which provides access to a patient's CDS prescription history, to ascertain that Deanna was seeking CDS for inappropriate purposes would constitute a breach of the standard of care the pharmacy defendants owed to her.

We are cognizant of the fact that George proffered no evidence in opposition to the summary judgment motions that the pharmacy defendants acted contrary to any regulatory or statutory requirement and he does not argue that any such violation, if established, would vest in him a private cause of action. Still, the regulations and statutes cited by George may be germane to the

trial court's analysis of the contours of the standard of care the pharmacy defendants owed to Deanna and whether they deviated from the standard.

B. Proximate Cause.

In the event the trial court finds that George has raised a genuine issue of material fact with respect to whether the pharmacy defendants deviated from the standard of care they owed to Deanna, it shall consider the defendants' arguments that they are entitled to summary judgment on the question of proximate cause. We agree with George's argument that the trial court erred when it applied a "but for" proximate cause analysis to the claims alleged against Walgreen. In routine tort cases, "the law requires proof that the result complained of probably would not have occurred "but for" the negligent conduct of the defendant." Conklin v. Hannoeh Weisman, 145 N.J. 395, 417 (1996) (quoting Vuocolo v. Diamond Shamrock Chemicals Co., 240 N.J. Super. 289, 295 (App. Div. 1990)). In some circumstances, however, a plaintiff may recover if he establishes that professional negligence increased the risk of harm posed by a preexisting condition and the increased risk was a substantial factor in producing the harm. As the Court explained in Scafidi,

[w]e adhere to our holding in Evers. Evidence demonstrating within a reasonable degree of medical probability that negligent treatment increased the risk of harm posed by a preexistent condition raises a jury

question whether the increased risk was a substantial factor in producing the ultimate result. The rationale underlying the use of a two-pronged jury instruction bears elaboration. Because this modified standard of proximate causation is limited to that class of cases in which a defendant's negligence combines with a preexisting condition to cause harm – as distinguished from cases in which the deviation alone is the cause of harm – the jury is first asked to verify, as a matter of reasonable medical probability, that the deviation is within the class, i.e., that it increased the risk of harm from the preexistent condition. Assuming that the jury determines that the deviation increased the risk of harm from the preexistent condition, we use the "substantial factor" test of causation because of the inapplicability of "but for" causation to cases where the harm is produced by concurrent causes. The "substantial factor" standard requires the jury to determine whether the deviation, in the context of the preexistent condition, was sufficiently significant in relation to the eventual harm to satisfy the requirement of proximate cause.

[119 N.J. at 108-09 (citations and footnote omitted).]

In exchange for this modified causation requirement, the professional defendant is responsible only for the damages attributable to the role the defendant's negligence played in the ultimate outcome. Id. at 112-13. The Court explained,

[t]o the extent that a plaintiff's ultimate harm may have occurred solely by virtue of a preexistent condition, without regard to a tortfeasor's intervening negligence, the defendant's liability for damages should be adjusted to reflect the likelihood of that outcome. That principle is basic in our decisional law.

[Id. at 112-13.]

Although the trial court did not cite to any precedents or set forth a standard in its proximate cause analysis on Walgreen's motion, it is apparent that it applied a "but for" standard of causation. For example, the trial court found that because Walgreen had never dispensed to Deanna Xanax, one of the medications causing her death, George could not prove proximate cause. However, under the Scafidi standard, it would not be necessary for Walgreen to have dispensed one of the medications that caused Deanna's death, provided George could prove that Walgreen's failure to stop dispensing Oxycodone to Deanne exacerbated the risk of Deanne preexisting addiction and was a substantial factor in her suffering and death.

On remand, the court should apply the Scafidi standard when determining whether George has raised a genuine issue of material fact with respect to proximate cause. In light of our conclusions with respect to the learned intermediary doctrine and the correct proximate cause standard, we need not address the trial court's application of the law of the case doctrine.

The trial court is best equipped to determine George's claim with respect to the need for further discovery. It is undisputed that the pharmacy defendants moved for summary judgment prior to the close of discovery. Whether, in light

of our holdings, the parties should be afforded additional time to complete discovery, including the production of expert reports, which would certainly be of assistance, and perhaps indispensable, to determining the issues that remain unresolved in this matter, will be decided in the first instance by the trial court.

The orders under review are reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION