SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3567-15T2

KIM GLUCKER and OYVIND KARLSEN, her husband,

Plaintiffs-Appellants,

v.

ROBERT BARBALINARDO, M.D., and MONTCLAIR SURGICAL ASSOCIATES,

Defendants-Respondents.

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Argued September 12, 2017 – Decided September 26, 2017

Before Judges Reisner and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-2373-13.

Ernest P. Fronzuto argued the cause for appellants (Fronzuto Law Group, attorneys; Mr. Fronzuto, of counsel and on the briefs; Casey Anne Cordes, on the briefs).

Louis A. Ruprecht argued the cause for respondents (Ruprecht Hart Weeks & Ricciardulli, LLP, attorneys; Daniel B. Devinney, on the brief).

PER CURIAM

In this medical malpractice case, plaintiffs Kim Glucker and her husband, Oyvind Karlsen,[1] appeal from the March 18, 2016 Law Division order granting the summary judgment dismissal of their claims against defendant Robert Barbalinardo, M.D., a board-certified general surgeon, and his surgical group, defendant Montclair Surgical Associates, P.A. Plaintiffs also appeal from an order, entered the same day, which denied their cross-motion for waiver, pursuant to N.J.S.A. 2A:53A-41(c).[2] Plaintiffs filed suit after plaintiff suffered a ruptured spleen during a routine colonoscopy performed by defendant. Because we conclude plaintiffs satisfied the good faith standard of the waiver provision of the Patients First Act, we reverse both orders under review and remand for trial.

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[1] For ease of reference, we refer to Kim Glucker individually as plaintiff and Dr. Barbalinardo as defendant.

[2] N.J.S.A. 2A:53A-41(c) is part of the New Jersey Medical Care Access and Responsibility and Patients First Act (Patients First Act or Act), N.J.S.A. 2A:53A-37 to -42. One provision of the Act, N.J.S.A. 2A:53A-41, "'establishes qualifications for expert witnesses in medical malpractice actions' and 'provides that an expert must have the same type of practice and possess the same credentials, as applicable, as the defendant health care provider, unless waived by the court.'" Nicholas v. Mynster, 213 N.J. 463, 479 (2013) (quoting Assembly Health & Human Services Committee, Statement to Assembly Bill No. 50 at 20 (Mar. 4, 2004)). Commonly referred to as "the waiver provision," N.J.S.A. 2A:53A-41(c) "allows an alternative to the kind-for-kind specialty requirement if a plaintiff has made a good faith effort but failed to identify an expert physician in the specialty area available to testify." Id. at 484.

I

These are the most pertinent facts. On December 5, 2011, plaintiff went to defendant for a routine colonoscopy. Defendant, a board-certified general surgeon who performs colonoscopies, does not have a sub-specialty. Plaintiff alleges that defendant negligently ruptured her spleen during the course of the colonoscopy. Following the colonoscopy, plaintiff experienced increasing abdominal pain and went to the emergency room at Mountainside Hospital, where doctors diagnosed an injury to her spleen. On December 6, 2011, surgery to repair the injury proved unsuccessful, and the next day, plaintiff underwent an exploratory laparotomy and the removal of her spleen. Plaintiff remained in intensive care until December 11, and went home on December 12, 2011.

After plaintiffs filed their complaint, they timely served an affidavit of merit (AOM) from a general surgeon, Peter Sarnelle, M.D., and an AOM from a gastroenterologist, Maxwell Chait, M.D. Plaintiffs then moved to confirm that both experts qualified to submit AOMs, pursuant to N.J.S.A. 2A:53A-41. On October 25, 2013, the court ruled that Dr. Sarnelle's AOM satisfied plaintiffs' AOM requirements, but that Dr. Chait's AOM did not.

In March 2014, Dr. Sarnelle withdrew as an expert due to illness. On February 9, 2015, plaintiffs served two reports from

proffered experts: Dr. Chait and an infectious disease expert, Richard K. Sall, M.D.

On February 18, 2015, defendants filed a motion to bar the report of Dr. Chait. Plaintiffs filed a cross-motion to allow for an exception under N.J.S.A. 2A:53A-41(c). The motion judge barred Dr. Chait from testifying as an expert and denied plaintiff's cross-motion for an exception. However, the judge extended discovery for ninety days and advised plaintiffs' counsel he could return to have the court further address his request for an exception, after completing additional searching for a replacement expert.

On July 7, 2015, plaintiffs' counsel again filed a motion to permit a waiver under N.J.S.A. 2A:53A-41(c), citing a "good faith" effort since "none of the seventeen (17) potential surgical experts" he contacted "were able to provide an opinion in this matter." On August 7, 2015, the same judge heard oral argument, initially found that plaintiffs "technically . . . met" the requirements of N.J.S.A. 2A:53A-41(c) by "checking off the boxes." However, the judge expressed concern that the certification of plaintiffs' counsel lacked details about why the seventeen other potential doctors could not serve as experts, and thus, he could not discern a "good faith effort." On these grounds, the judge denied the motion, but gave plaintiffs' counsel thirty days to

provide a supplemental certification, explaining, "I want more information on why the experts turned you down."

On September 1, 2015, plaintiffs' counsel submitted a supplemental certification, detailing his extensive efforts to secure a substitute expert for Dr. Sarnelle. These efforts "included contacting attorney acquaintances, contacting the memberships of attorney organizations and contacting a service [which] finds experts for medical malpractice review." While the expert witness service had fifty-eight general surgeons in its databank, "most were excluded immediately since they do not perform screening colonoscopies." The seven general surgery experts who did perform colonoscopies "were all sub-certified in colo-rectal surgery."

Plaintiff's counsel then contacted a second expert witness referral service, which had forty-nine active general surgery experts in its database. None of the experts proved capable of providing the required testimony. Plaintiff's counsel then summarized his efforts to obtain a substitute board-certified general surgeon expert:

> In all, my firm has contacted colleagues, attorney organizations and two expert referral services, which represents a broad cross-section of referral sources for a medical expert referral. From the expert referral services alone, we know that over 100 general surgery experts were considered; however they

> did not meet the case specific qualification requirements. This, of course, does not include the pool of general surgery experts that cannot be quantified from colleagues and attorney organization contacts, which informally reviewed their potential general surgery expert pool and determined that there was not a fit for this case so as to not provide a referral. Ultimately, notwithstanding our diligent efforts, we have been unable to locate a general surgery expert that meets the qualifications requirements of this case."

On November 20, 2015, the judge heard oral argument, and remained unsatisfied with the supplemental certification and continued to deny plaintiffs' waiver motion. The judge expressed concerns plaintiffs were circumventing the statute, but denied defendants' motion for summary judgment, citing "some alternatives . . . short of summary judgment."

On February 2, 2016, defendants again moved for summary judgment. On March 2, 2016, plaintiffs again cross-moved for a waiver under N.J.S.A. 2A:53A-41(c). On March 18, 2016, the case came before a different judge (the second judge) for oral argument. Plaintiffs' counsel again argued his certification set forth sufficient good faith efforts to warrant the grant of a waiver:

> This is a case where a general surgeon is doing a screening colonoscopy. Most general surgeons, that is not within the scope of what they do. . . . [T]he vast majority of screening colonoscopies are done by gastroenterologists.

. . . .

> And then we had . . . those expert referral services, they have . . . over 100 general surgery experts within their database. None of them met the case specific qualifications required in this case. General surgeon, not sub-certified in any other field, [who] performs screening colonoscopies.

The second judge agreed with plaintiffs, ultimately acknowledging that a waiver was proper in this case. However, apparently believing the law of the case doctrine precluded him from granting the waiver, the second judge denied plaintiffs' waiver request and granted defendants' motion for summary judgment. This appeal followed.

II

In reviewing a grant of summary judgment, we apply the same standard under Rule 4:46-2(c) that governs the trial court. See Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007). We "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

A.

In 2004, the Legislature enacted the New Jersey Medical Care Access and Responsibility and Patients First Act (Act), N.J.S.A. 2A:53A-37 to -42. The Act set forth detailed standards for testifying experts, "generally requiring the challenging expert to be equivalently-qualified to the defendant[.]" Ryan v. Renny, 203 N.J. 37, 52 (2010). However, the Act further provided "for waiver of the newly-tightened requirements in certain circumstances[.]" Id. at 53. Specifically,

> [a] court may waive the same specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association and board certification requirements of this section, upon motion by the party seeking a waiver, if, after the moving party has demonstrated to the satisfaction of the court that a good faith effort has been made to identify an expert in the same specialty or subspecialty, the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in, or full-time teaching of, medicine in the applicable area of practice or a related field of medicine.
>
> [N.J.S.A. 2A:53A-41(c).]

In Ryan, our Supreme Court reversed the decision of this court "declaring that [the plaintiff] failed to satisfy the good faith standard of the waiver provision of N.J.S.A. 2A:53A-41(c)[.]" Ryan, supra, 203 N.J. at 61. In reversing, the Court

found that a plaintiff satisfied the required good faith standard and permitted a non-board-certified physician to testify that the actions of a board-certified specialists did not meet the standard of care. Id. at 45. The Court determined that counsel for the plaintiff undertook efforts that were sufficient for the good faith effort requirement. Id. at 56. The Court emphasized the plain language of the waiver provision, which "directs the judge to focus on the 'effort' the moving party made to obtain a statutorily-authorized expert, and not on the reasons why a particular expert or experts declined to execute an affidavit." Id. at 55.

> Indeed, the very existence of the waiver provision makes it obvious to us that the Legislature did not intend a malpractice case to stand or fall solely on the presence or absence of a same-specialty expert. If that were the case, the Legislature would not have provided for waiver or, at the very least, would have declared that waiver was somehow limited by the substance of an expert's refusal to execute an affidavit. It did not do so.
>
> By the broad waiver provision, the Legislature explicitly recognized that there would be legitimate malpractice claims for which a plaintiff would not be able to obtain an affidavit of merit from an equivalently-qualified expert or even from an expert in the same field. It thus created a safety valve for those cases by providing the judge with broad discretion to accept an expert with "sufficient training, experience and knowledge to provide the testimony[,]" but

> only if plaintiff made a good faith effort to satisfy the statute. The Legislature left it to the "satisfaction of the court" to determine whether an honest "effort" was made to identify an expert in the same specialty or subspecialty. It is the "effort" of the movant that is the focal point of the waiver provision.
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> [Id. at 55-56]

B.

The principal issue on this appeal is whether the second judge properly applied the law of the case doctrine in upholding the decision of the first judge, denying plaintiffs a waiver under N.J.S.A. 2A:53A-41(c). Plaintiffs argue the second judge erroneously applied the law of the case doctrine by following the previous ruling that plaintiffs failed to meet the requirements for a waiver pursuant to N.J.S.A. 2A:53A-41(c).

The law of the case doctrine provides "that a legal decision made in a particular matter 'should be respected by all other lower or equal courts during the pendency of that case.'" Lombardi v. Masso, 207 N.J. 517, 538 (2011) (quoting Lanzet v. Greenberg, 126 N.J. 168, 192 (1991)); State v. Reldan, 100 N.J. 187, 203 (1985). Although non-binding, the doctrine is "intended to 'prevent relitigation of a previously resolved issue'" in the same case, "by a different and co-equal court." Lombardi, supra, 207

N.J. at 538-39 (quoting In re Estate of Stockdale, 196 N.J. 275, 311 (2008)).

However, the law of the case "doctrine is not an absolute rule as 'the court is never irrevocably bound by its prior interlocutory ruling[.]'" Jacoby v. Jacoby, 427 N.J. Super. 109, 117 (App. Div. 2012) (citations and internal quotation marks omitted). Thus, when "there is substantially different evidence" from that available at the time of the prior decision, "new controlling authority, or the prior decision was clearly erroneous[,]" the doctrine does not apply. Sisler v. Gannett Co., 222 N.J. Super. 153, 159 (App. Div. 1987), certif. denied, 110 N.J. 304 (1988). The rule is discretionary, and the doctrine is "applied flexibly to serve the interests of justice." State v. Reldan, 100 N.J. 187, 205 (1985).

Here, we conclude the second judge mistakenly failed to exercise his discretion when he declared himself "bound by" the first judge's previous ruling. Pursuant to the above principles, he was not required to follow the previous decision. See State v. Hale, 127 N.J. Super. 407, 411 (App. Div. 1974). Because the prior decision was clearly erroneous, and the second judge agreed with plaintiffs that the record supported the grant of a waiver under N.J.S.A. 2A:53A-41(c) but incorrectly believed he could not

grant the waiver, the second judge's failure to exercise his discretion warrants reversal of both orders under review.

The record here clearly establishes that plaintiffs made an honest effort to identify an expert in the same specialty or subspecialty as defendant. As Justice Long explained in Ryan, "It is the 'effort' of the movant that is the focal point of the waiver provision." Ryan, supra, 203 N.J. at 56. Plaintiffs' efforts to identify and retain a qualified expert here were extensive, and significantly greater than the efforts found adequate in Ryan. Ibid. Contrary to Ryan, the first judge mistakenly focused on "the reasons why a particular expert or experts declined" to serve. Id. at 55.

Reversed and remanded. We do not retain jurisdiction.