

**NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."  
Although it is posted on the internet, this opinion is binding only on the  
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5623-14T3

GAIL KROSS,

Plaintiff-Appellant,

v.

GARY BRESLOW, M.D.,

Defendant-Respondent.

---

Argued October 26, 2016 – Decided October 4, 2017

Before Judges Simonelli and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-9734-10.

Alan Berliner argued the cause for appellant (Rothenberg, Rubenstein, Berliner & Shinrod, LLC, attorneys; Mr. Berliner, on the brief).

Evelyn C. Farkas argued the cause for respondent (Farkas & Donohue, LLC, attorneys; Ms. Farkas, of counsel; Meredith E. Traina, on the brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

In this medical malpractice case, plaintiff Gail Kross appeals from an August 11, 2015 Law Division order granting defendant Dr. Gary Breslow's motion for a directed verdict and dismissing her complaint with prejudice. Plaintiff contends that the trial judge erred in barring the testimony of her sole liability expert, Richard Marfuggi, M.D., a board certified plastic surgeon, on the ground that Dr. Marfuggi's opinion amounted to an inadmissible net opinion. Based on our review of the record under the applicable legal principles, we affirm.

I.

We recount the facts and procedural history presented in the record. On August 2, 2006, plaintiff, who was then fifty-seven years old, underwent an abdominoplasty (tummy tuck),<sup>1</sup> as well as

---

<sup>1</sup> According to the American Society of Plastic Surgeons, a complete tummy tuck or abdominoplasty is a surgical procedure performed under general anesthesia

to flatten the abdomen by removing excess skin and fat from the lower abdominal region and tightening the muscles of the abdominal wall. . . . [T]he surgeon generally makes a long incision from hip to hip, just above the pubic region. A second incision releases the navel from surrounding tissue. The surgeon separates the skin from the abdominal wall up to the ribs, lifts the skin flap, and tightens the abdominal muscles by pulling them closer together and stitching them into position. Excess skin is removed from the flap and a new

liposuction of the sides of her abdomen, performed by Dr. Berman, a non-party to this action. Plaintiff was unhappy with the results and had difficulty healing. Plaintiff complained to Dr. Berman that her "incisions[] became red and painful[,]" "her abdomen was tight[,]" "[s]he couldn't stand straight[,]" and "[s]he was in constant pain[.]" Dr. Berman treated plaintiff with steroid injections, a common treatment for thickened or painful scarring, but the injection therapy was unsuccessful.

About a year later, in June and July of 2007, Dr. Berman performed two scar revisions, which are superficial excisions of the scar performed under local anesthesia, and treated plaintiff with a second round of steroid injections. However, the procedures failed to improve the appearance of plaintiff's scars, which had developed keloids.<sup>2</sup> Subsequently, plaintiff wrote to Dr. Berman,

---

hole cut for the navel, which is then stitched into place before the incisions are closed.

[Tummy Tuck (Abdominoplasty), Am. Soc'y of Plastic Surgeons, [\(https://www.plasticsurgery.org/for-medical-professionals/resources-and-education/publications/physicians-guide-to-cosmetic-surgery/body-contouring-surgical-procedures-physician%E2%80%99s-guide?sub=Tummy+Tuck+\(Abdominoplasty\)\)](https://www.plasticsurgery.org/for-medical-professionals/resources-and-education/publications/physicians-guide-to-cosmetic-surgery/body-contouring-surgical-procedures-physician%E2%80%99s-guide?sub=Tummy+Tuck+(Abdominoplasty)) (last visited Sept. 25, 2017).]

<sup>2</sup> According to Dr. Marfuggi, "keloid scarring is a thickening of a scar . . . beyond the margins of the initial wound."

indicating that she remained dissatisfied with the appearance of her scars and that her complications persisted. Dr. Berman refunded plaintiff \$14,000 in exchange for a signed release barring any future claims attributable to his care.

In December 2007, plaintiff consulted with a second plastic surgeon, Dr. Giampapa. To improve the appearance of the scars and alleviate her other complaints, Dr. Giampapa proposed a "two-part" procedure, involving the "insertion of tissue expanders as a first-stage operation" to "allow the skin to stretch," and then a second procedure called a "V-Y flap revision" to address her complaints stemming from the tummy tuck. Dr. Giampapa indicated that plaintiff's skin was under too much tension, meaning "there was not enough skin present or . . . too tight a skin envelope" to perform the procedure without the use of tissue expanders. However, plaintiff did not proceed with Dr. Giampapa's proposed procedures.

Instead, on May 9, 2008, plaintiff sought treatment from Dr. Breslow. After examining plaintiff, Dr. Breslow "noted the presence of hypertrophic scarring, which [were] scars that had widened," but "made no mention of the tightness of the skin" or the need for a more invasive two-stage procedure. Instead, Dr. Breslow recommended a less invasive "in-office scar revision[,]" which plaintiff underwent on June 4, 2008. The procedure involved

"cutting out the existing scar under local anesthesia and sewing that together using . . . nylon sutures, around the umbilicus, and . . . a dissolving barbed suture in the lower abdomen" in order to revise "both the umbilical scar . . . around [plaintiff's] bellybutton, and the transverse scar . . . that ran across the lower portion of [her] abdomen." The scar revision was performed without complications. However, post-operatively, plaintiff received "a series of low[-]dose radiation treatments[,]" as well as a steroid injection "to prevent the recurrence of [the] keloid[.]"

Throughout the summer and fall of 2008, plaintiff returned to Dr. Breslow for several follow-up appointments. In June, plaintiff complained of "abdominal discomfort, abdominal distention, vaginal irritation, and tightness of the lower abdomen." Dr. Breslow thought plaintiff's complaints were "secondary" to the radiation therapy and referred her to Dr. Ahlborn, who diagnosed her with an umbilical hernia. In December 2008, during plaintiff's last visit with Dr. Breslow, he advised her it would take "up to three years for total healing to take place, and that this was partially the cause of her complaints." Nonetheless, Dr. Breslow suggested that further revision procedures were possible, "both for the umbilicus and for the abdominoplasty."

Thereafter, plaintiff sought the opinion of several other surgeons. On September 8, 2009, Dr. Boss examined plaintiff and noted "a loss of continuity of the umbilicus, meaning that the umbilicus was no longer attached as it had originally been[,]" separation of the abdominal muscles, and "a hernia around the umbilicus." Dr. Boss also found that plaintiff's "vagina had been displaced anteriorly and superiorly[,]" meaning "the tissue on the sides of [her] vagina, had been pulled upward."

In April 2010, a second doctor, Dr. Zubowski, made similar findings. Dr. Zubowski noted "the presence of a poorly defined umbilicus[,]" meaning that plaintiff's "umbilicus . . . had been replaced with a new scar." Dr. Zubowski also noted the "laxity or looseness of the upper abdominal musculature" and that plaintiff's "lower abdominal scar, had spread, [and] that it was firm and tender" to the touch.

In May 2010, plaintiff sought the opinion of a third physician, Dr. Margiotta, who indicated that plaintiff had a "tight intraumbilical envelope, elevated mons,<sup>3</sup> and wide scarred umbilicus." In other words, plaintiff's "skin from the bellybutton down to the vagina was noted to be tight," "the tissue on the side of the vagina, had been elevated or pulled superiorly," and "the

---

<sup>3</sup> Dr. Marfuggi testified that the mons "is the area in the pubic hairline[.]"

umbilicus itself had spread[.]” Like Dr. Giampapa, Dr. Margiotta recommended a revision of plaintiff's abdominoplasty to “repair the stretching of the abdominal muscles” and the use of “tissue expanders to stretch the skin” before performing a scar revision.

On September 15, 2010, prior to filing the lawsuit, plaintiff was examined by Dr. Marfuggi. Plaintiff complained “her vaginal area was easily irritated,” particularly when wearing constricting clothing, and “sexual activity was not possible due to pain[.]” She had difficulty “sitting for prolonged periods of time,” as well as trouble sleeping and urinating. She also complained of “gastrointestinal problems, . . . spasms after eating, cramping, bloating,” and “stress incontinence[.]” She “believed she had an umbilical hernia” and stated “she no longer had a bellybutton.”

Based on his examination, Dr. Marfuggi found “an absence of umbilical tissue and a prominence of scar” tissue. He noted plaintiff's umbilicus had been converted to a vertical oval, suggesting abdominal tension in the lower region “pulling it inferiorly or down.” Dr. Marfuggi also reported that the center of plaintiff's abdominal incision was “very dark and wide[,],” a condition known as “scar hypertrophy” or hyperpigmentation. Dr. Marfuggi added that the scar along plaintiff's “pubic hairline ha[d] been flattened and rotated superiorly or up.”

During the examination, Dr. Marfuggi photographed plaintiff's abdomen, "including the area of her scars from the abdominoplasty and the scar revision." Plaintiff also provided a photograph of her incision taken in 2006 after Dr. Berman's abdominoplasty. Comparing both photographs, Dr. Marfuggi indicated that in the 2006 photo, plaintiff's scar was "transverse, very red[,] and consistent with her complaints. Dr. Marfuggi also noted that the 2006 photograph showed "significant . . . distance between the scar and the pubic hairline," and that plaintiff's umbilicus was "distorted" and "converted to an oval that is pulled in a north/south direction[.]" In addition, "[t]he scar in 2006 [was] asymmetric[,] with the left side of plaintiff's scar appearing lower than the right.

On November 9, 2010, plaintiff filed a complaint against Dr. Breslow and unnamed fictitious defendants in connection with the June 2008 scar revision. Plaintiff alleged Dr. Breslow "failed to possess the degree of knowledge ordinarily possessed and exercised by others in the . . . profession of plastic surgery[,] . . . did negligently and careless[ly] treat" her, and caused her to "sustain severe and permanent injuries to her abdomen and other parts of her body." On January 24, 2011, Dr. Breslow filed a contesting answer, including a demand for an affidavit of merit, pursuant to N.J.S.A. 2A:53A-27, and answers to interrogatories.



On June 11, 2012, plaintiff amended her answers to interrogatories to identify Dr. Marfuggi as her sole liability expert in the field of plastic surgery.

During the discovery period, Dr. Marfuggi authored a written report and submitted to depositions, including two videotaped de bene esse depositions on June 5, 2014 and March 17, 2015, in lieu of a court appearance. See R. 4:14-9. Dr. Marfuggi opined that Dr. Breslow deviated from the standard of care in his treatment of plaintiff. Dr. Marfuggi testified that, before performing the scar revision, Dr. Breslow did not adequately consider "the deficiency of skin or tightness of the skin in [plaintiff's] lower abdominal area" documented by Drs. Giampapa and Margiotta and depicted in plaintiff's 2006 photograph. Dr. Marfuggi explained that

when a scar revision is done, the ideal situation is to remove the cutout, the existing scar, and sew the two unscarred sides together without tension. And if there is tension to begin with, that is if there already is a tightness in the area, simply cutting out the scar and sewing the sides together would pull the incision together under even more tension, and this causes a distortion of the skin that is pulling things either down or up, and also increases the chances of having an undesirable scar result.

Dr. Marfuggi concluded that Dr. Breslow's alleged deviation from the standard of care directly caused "distortion of [plaintiff's]

anatomy," specifically, deformity of the umbilicus "into a vertical oval," and "superior rotation" of the skin in plaintiff's pubic area caused by the tightness of "the lower abdominal skin[.]"

While her case was pending, plaintiff consulted Dr. Pyo to address the complications she attributed to Dr. Breslow's June 2008 procedure. On October 8, 2014, Dr. Pyo performed abdominal wall reconstruction surgery to lower plaintiff's previous incision, release the tension on the skin, restore the pubic anatomy, and repair the umbilical hernia. Dr. Pyo's operative report indicated that by performing a dissection, he "was able to pull . . . the skin down . . . a little bit under one inch." Once "the fascial defect was closed[,]" plaintiff had "significant laxity of the abdominal wall." However, after her "pubic tissues and the tissues of the mons . . . were released," Dr. Pyo had "some concern about the tension of the abdominal skin flap and [its] ability to maintain the lower position" and avoid plaintiff's original problem. As a result, Dr. Pyo used Mitek anchor sutures to stabilize the new incision line and avoid "upward displacement[.]" Notably, he did not use tissue expanders or new skin during the procedure, as he found significant laxity of the abdominal wall.

Following Dr. Pyo's reconstruction surgery, Dr. Marfuggi examined plaintiff for a second time on January 7, 2015, to assess

any improvement in her condition from the surgery. Following his examination, Dr. Marfuggi authored an addendum report, the contents of which he testified to during the March 17, 2015 deposition. Plaintiff told Dr. Marfuggi that the reconstruction surgery alleviated almost all of her symptoms. Dr. Marfuggi confirmed that plaintiff's "whole lower abdomen was less tight and . . . appeared in a more natural position" as a result of the surgery. According to Dr. Marfuggi, this new information confirmed his prior opinion.

On July 27, 2015, the parties appeared for trial. At the outset, defendant moved in limine to bar Dr. Marfuggi's testimony asserting that he rendered a net opinion, the exclusion of which would warrant a directed verdict in defendant's favor. After reviewing Dr. Marfuggi's deposition testimony and entertaining oral argument, the trial court granted defendant's motion. The court reasoned that Dr. Marfuggi's testimony constituted a net opinion because it did not establish a causal connection between plaintiff's physical injuries and Dr. Breslow's alleged deviation. Finding that plaintiff could not "sustain her burden of proof without . . . the expert opinion[,]" the court granted defendant's motion for a directed verdict and dismissed the complaint with prejudice. The court entered a memorializing order on August 11, 2015, and this appeal followed.

## II.

Plaintiff argues that the court erred in barring Dr. Marfuggi's testimony as a net opinion. We note, at the outset, that "[t]he admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Townsend v. Pierre, 221 N.J. 36, 52 (2015). We apply a "deferential approach to a trial court's decision to admit [or exclude] expert testimony, reviewing it against an abuse of discretion standard." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011). An abuse of discretion "arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002).

N.J.R.E. 702 and N.J.R.E. 703 frame our analysis regarding the admissibility of expert testimony. The former requires that the expert be qualified in his or her respective field to offer testimony that "will assist the trier of fact to understand the evidence or to determine a fact in issue[.]" N.J.R.E. 702. The latter addresses the foundation for expert testimony. N.J.R.E. 703. The rule mandates that expert opinions "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, supra, 221 N.J. at 53 (quoting Polzo v. Cty. 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.'" Townsend, supra, 221 N.J. at 53-54 (quoting Polzo, supra, 196 N.J. at 583). "The rule requires that an expert '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)). To satisfy 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 Landriqan v. Celotex Corp., 127 N.J. 404, 417 (1992)). In contrast, an expert's conclusion must be "excluded if it is based merely on unfounded speculation and unquantified possibilities." Ibid. (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div.), certif. denied, 154 N.J. 607 (1997)). Given the weight accorded to expert testimony, "a trial court must ensure that an expert is not permitted to express speculative opinions or personal views that are unfounded in the record[,]" or an

"opinion that is unsupported by the factual record or . . . contradicts that record." Ibid.

Based on our review of the record, we discern no abuse of discretion in the court's decision to bar Dr. Marfuggi's expert testimony. Dr. Marfuggi relied on the records of Dr. Giampapa and Dr. Margiotta, photographs of plaintiff's incision, as well as his own examination of plaintiff to support his conclusion that there was insufficient laxity for Dr. Breslow to perform the 2008 scar revision. However, as the court correctly concluded, Dr. Marfuggi's testimony failed to establish the "causal connection" between plaintiff's complaints and the treatment rendered by Dr. Breslow.

Dr. Marfuggi did not provide any objective criteria for concluding that Dr. Breslow failed to consider the laxity of plaintiff's skin, nor specific factual or methodological bases to sustain his conclusion that Dr. Breslow's minor scar revision directly caused plaintiff's substantial and prolonged complications. We agree with the court that Dr. Marfuggi's testimony was no more than "a bare conclusion without establishing the [why and wherefore] to connect . . . [Dr. Breslow's] procedure with the injuries suffered[, ] and his conclusion that the deviation occurred when [Dr. Breslow] failed to consider the tightness of the skin."

Acknowledging that this was not "your classic net opinion case[,] " the court construed plaintiff's position as attributing her complaints to the procedure performed by Dr. Breslow, rather than Dr. Breslow's procedure failing to alleviate her complaints. The court determined that Dr. Marfuggi's reliance on Dr. Giampapa's and Dr. Margiotta's records involving more invasive procedures to establish a deviation on the part of Dr. Breslow was misplaced. The court explained:

There is no connection in anything that Dr. Marfuggi says about observations of the lack of tissue to . . . establish that there was a problem with tissues in doing . . . a revision of just the scar internally.

In other words, for Dr. Marfuggi to rely upon the statements exacted from a record in dealing with recommendations of major procedures to suggest that that's the foundation for his opinion as it relates to this minor excision[,] I think is not something that is supported by [the] factual record.

. . . [N]othing that I read in his transcript . . . develop[s] that in such a way. There's no language that says well, . . . if that's the case then the fact that you do this minor surgery is enough to create this sort of problem, these same sorts of issues that she's suffering here.

. . . [H]e has not pointed to facts that are contained in the record upon which he could rely to formulate the opinion that he did.

We acknowledge, as did the court, that Dr. Marfuggi's testimony was "confusing at times and appear[ed] to be internally inconsistent[.]" As an example, the court pointed out that while Dr. Marfuggi relied heavily on the photographs to support his opinion, at other times, he retreated from that position. The following colloquy between defense counsel and Dr. Marfuggi highlights one such instance:

Q: Would you agree that skin laxity or looseness is determined by a pinch test or something similar to that and not one picture?

A: Yes.

Q: Okay. So fair to say that you could not determine whether or not there was laxity or not, based on the photograph taken in 2006. Correct?

A: Yes. I believe I testified to that fact already, yes.

. . . .

Q: Okay. But you would agree that th[e] photograph, 2006, can't be a determinant as to whether or not there was laxity prior to Dr. Breslow's surgery. Correct?

A: The photo cannot, correct.

Nonetheless, upon being shown one of Dr. Breslow's photographs of plaintiff's incision taken after Dr. Breslow's scar revision on June 12, 2008, Dr. Marfuggi agreed that there was apparent laxity:



Q: And that shows the abdominal incision completely intact. Correct?

A: Yes.

Q: And you would agree with me that th[e] incision appears to be under no tension correct?

A: That's correct.

Later, when challenged on whether Dr. Breslow's scar revision procedure had caused plaintiff's "subjective symptoms[,]" relying on a comparison between plaintiff's 2006 photograph and his 2015 photograph, Dr. Marfuggi responded "I cannot come up with any other alternative to the cause of [plaintiff's] deformities and complaints than that too much skin was taken out or skin was taken out under too much tension[.]"

Further, in addition to relying on the photographs, Dr. Marfuggi based his opinion on Dr. Giampapa's and Dr. Margiotta's records referring to the use of tissue expanders to increase laxity. However, Dr. Marfuggi acknowledged that the procedures contemplated by Drs. Giampapa and Margiotta were more invasive than a scar revision procedure. When cross-examined about the invasiveness of Dr. Breslow's scar revision procedure, which Dr. Marfuggi agreed was a "superficial excision[,]" the following colloquy occurred:

Q: With a scar revision, you are removing the scar from the layer of skin. Correct?

A: That can be done. You have to understand one can do a scar revision all the way through all of the tissues. In other words, the muscle could be scarred. The fascia could be scarred.

Q: Understand, but that's not what we are talking about here - -

A: Correct.

Q: - - as far as what Dr. Breslow did. Right?

A: That's correct.

Q: Okay. So as far as what Dr. Breslow did, he didn't . . . go into the fascia layers. Correct?

A: I don't know the answer to that, whether he went into the fascia layers, but he certainly at least went to the fascia layers.

Q: Where do you get any information that Dr. Breslow may have gone into the fascia layers?

A: I didn't say that he did.

Q: Okay. So sitting here today, you are well aware that Dr. Breslow's revision procedure did not go into the fascia layers. Correct?

A: I can't say that it did or did not.

Later, Dr. Marfuggi again reversed his testimony:

Q: . . . And based on your review of the materials in this case, the scar tissue was removed from the skin layer and not anything deeper. Correct?

A: Yes.

Notably, Dr. Marfuggi also admitted that plaintiff "[c]ould . . . have developed [her] symptoms in 2006" from Dr. Berman's surgery.

Finally, in reviewing a directed verdict, this court "employs the same standard on review as the trial court did in deciding defendant's motion for a directed verdict." Luczak v. Twp. Of Evesham, 311 N.J. Super. 103, 108 (App. Div.), certif. denied, 156 N.J. 407 (1998). Indeed, a court should only deny a motion for directed verdict "'if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in [the non-movant]'s favor.'" Sackman v. N.J. Mfrs. Ins. Co., 445 N.J. Super. 278, 291 (App. Div. 2016) (quoting Edwards v. Walsh, 397 N.J. Super. 567, 571 (App. Div. 2007)); see also R. 4:37-2(b). Here, we find no basis in the record to reverse the court's grant of defendant's motion for a directed verdict once plaintiff's expert testimony was excluded.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION