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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-0290-16T1

WILLIAM AMES and KIMBERLY
AMES, individually and as
wife and husband,

Plaintiffs-Appellants,

v.

TODD M. LIPSCHULTZ, M.D., and
PREMIER ORTHOPEDICS,

Defendants,

and

REHAB EXCELLENCE CENTER, LLC,

Defendant-Respondent.

Submitted October 18, 2017 – Decided February 6, 2018

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey,
Law Division, Gloucester County, Docket No.
L-1665-14.

James R. Radmore, attorney for appellants.

Law Office Gerard M. Green, attorneys for
respondent (Michael L. Lazarus, of counsel and
on the brief).

PER CURIAM

Plaintiffs William Ames and Kimberly Ames appeal from an August 11, 2016 order granting summary judgment to defendant Rehab Excellence, LLC. We affirm.

I.

We view the factual record in the light most favorable to plaintiffs as the non-moving parties. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). William Ames was employed by United Parcel Service as a driver.¹ On October 23, 2012, he injured his right shoulder while at work. An MRI revealed a twelve millimeter full thickness tear of the distal supraspinatus tendon, thickening of the acromioclavicular joint, and signs of subacromial bursitis. Shortly thereafter, he came under the care of defendant Dr. Todd M. Lipschultz, an orthopedic surgeon at defendant Premier Orthopedics. A preoperative injection provided no benefit. On November 28, 2012, Ames underwent arthroscopic surgery to repair the rotator cuff tear with two bone anchors, as well as subacromial decompression, and debridement of glenohumeral labral fraying. He then underwent postoperative physical therapy at defendant Rehab Excellence Center, LLC (Rehab), but his progress was complicated by stiffness. Contrary to lifting and range of

¹ Unless otherwise indicated, any references to Ames or plaintiff mean only William Ames, not Kimberly Ames.

motion restrictions imposed by his physician, plaintiff lifted weights in excess of the weight limitations and beyond the range of motion restrictions during the physical therapy sessions.

On March 20, 2013, Ames returned to the operating room for manipulation of the right shoulder under anesthesia to address adhesive capsulitis, but continued to experience recurrent pain and stiffness in his shoulder and had difficulty reaching and lifting. He also experienced intermittent numbness and tingling down to his hand. An MRI of his right shoulder performed in April 2013 revealed a full-thickness recurrent two centimeter supraspinatus tear, an intact labrum, and no evidence of atrophy.

Dr. Matthew Pepe, an orthopedic surgeon at the Rothman Institute, examined Ames on May 7, 2013. He issued the following diagnoses: "Right shoulder followup rotator cuff repair with postoperative adhesive capsulitis." Dr. Pepe described a treatment plan starting with outpatient surgery, followed by a gentle passive motion program, then light duty after two to two and one-half months, followed by full duty at six months.

On November 26, 2014, plaintiffs commenced this professional negligence action against defendants Todd M. Lipschultz, M.D., Premier Orthopedics, and Rehab. Defendants Dr. Lipschultz and Premier Orthopedics were subsequently dismissed from the action by agreement. Plaintiffs alleged that Rehab deviated from the

standard of care for physical therapists causing Ames to suffer serious, permanent injury to his right shoulder. Plaintiffs contend that Rehab engaged Ames in an overly aggressive course of physical therapy, having him perform exercises that exceeded the weight and range of motion limitations imposed by his treating physician.

On February 11, 2015, Rehab filed an answer and served discovery on plaintiffs demanding answers to Form A and A(1) interrogatories. Plaintiffs served their answers to Form A and A(1) interrogatories on October 21, 2015. Although plaintiffs identified Michael T. Gross, Ph.D., a board-certified physical therapist as their standard of care expert, they did not identify a causation expert. Plaintiffs did not amend their answers to interrogatories to identify a proximate cause expert. Instead, they relied on the report of a treating physician.

A May 27, 2016 order extended discovery to September 28, 2016, required plaintiffs to serve their expert reports by July 1, 2016, and scheduled trial for October 17, 2016. Plaintiffs did not move to extend those deadlines.

On July 5, 2016, Rehab filed a motion for summary judgment returnable on August 5, 2016. The motion was based on plaintiffs' failure to produce an expert report opining that Rehab's deviation from the standard of care was the proximate cause of the injuries

suffered by Ames. Plaintiffs filed opposing papers on August 3, 2016. The opposing papers included, for the first time, a May 7, 2013 report by Dr. Pepe.²

After hearing oral argument on August 5, 2016, the judge issued an August 11, 2016 oral decision and order granting Rehab summary judgment. The judge emphasized that plaintiffs had not identified a physician that would provide expert testimony that related Rehab's deviation from the standard of care to the alleged injuries. The judge explained that having an expert who opines that Rehab deviated from the standard of care is not enough to prove plaintiffs' case. He indicated that plaintiffs also needed the testimony of a treating physician or expert who connects the deviation of exceeding weight and range of motion restrictions to Ames' ultimate injuries. Plaintiffs had no expert or treating physician who provided that opinion.

In reaching that decision, the judge considered Dr. Pepe's report despite Rehab's contention that it was served well after the July 1, 2016 deadline for serving expert reports. Rehab argues that the late submission of Dr. Pepe's report on August 3, 2016, was in violation of the discovery rules, the deadline for service

² On May 9, 2016, defense counsel sent billing records provided by Rothman Institute to plaintiffs' counsel as an amendment to Rehab's answers to interrogatories. Plaintiffs contend that the report by Dr. Pepe was not made available until that date.

of expert reports, and Rule 4:46-1. Plaintiffs contend that defense counsel obtained the report no later than May 9, 2016, well in advance of the expert report deadline. The trial court did not bar Dr. Pepe's report or base its decision on the plaintiffs' alleged failure to serve his report in a timely fashion. Instead, the court based its decision on the substantive contents of the report.

The judge noted that Dr. Pepe's report did not connect the overly aggressive physical therapy to any injuries. He then reiterated:

We have nothing in either an expert report or in any of the medical records that connects up the injury, whether it be the tear or whether it be the continued stiffness, whether it be the inability to work or whether it be to the adhesive capsulitis which relates to the stiffness.

Nobody ever connects those things up to the [d]efendant. So while I've got a clear statement by the rehab expert that [Anthony] Vendetti [a physical therapist employed by Rehab] deviated from [the] standard of care, there is nobody that has been put forth by the Plaintiff that makes a direct statement that says that the deviation then led to this injury for which the Plaintiff is suing and you need that. Without it, you can't prove the case.

On August 16, 2016, the judge amplified his findings in a supplemental oral opinion. He again noted that there was nothing in Dr. Pepe's report that references the tear, post-operative

adhesive capsulitis, or stiffness being a product of the over-aggressive therapy by Rehab. He further noted that Dr. Pepe never comments about Rehab being overly aggressive or the cause of the problems suffered by Ames.

Plaintiffs contend the trial court erred by granting summary judgment to Rehab despite their production of a treating physician's report. They claim that Dr. Pepe's report provided the necessary opinion regarding proximate causation to establish a prima facie case of professional negligence.

II.

Our review of a ruling on summary judgment is de novo, applying the same legal standards as the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (citing Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012)). Summary judgment is appropriate where "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." R. 4:46-2(c); accord Brill, 142 N.J. at 528-29. "When no issue of fact exists, and only a question of law remains, this Court affords no special deference to the legal determinations of the trial court." Templo

Fuente, 224 N.J. at 199 (citing Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

"The motion court must analyze the record in light of the substantive standard and burden of proof that a factfinder would apply in the event that the case were tried." Globe Motor Co. v. Igdaley, 225 N.J. 469, 480 (2016). "Thus, 'neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action.'" Ibid. (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)).

Because there is no relevant genuine issue of material fact on this record, we review de novo the trial court's legal determination that summary judgment was appropriate because plaintiffs could not prove professional negligence without expert testimony that Rehab's deviation from the standard of care proximately caused the ultimate injuries suffered by Ames.

III.

"To prove medical malpractice, ordinarily, 'a plaintiff must present expert testimony establishing (1) the applicable standard of care; (2) a deviation from that standard of care; and (3) that the deviation proximately caused the injury.'" Nicholas v. Mynster, 213 N.J. 463, 478 (2013) (quoting Gardner v. Pawliw, 150 N.J. 359, 375 (1997) (citations omitted)); see also Komlodi v.

Picciano, 217 N.J. 387, 409 (2014). Thus, the plaintiff in a medical malpractice case must demonstrate that the defendant's deviation from the applicable standard of care was, to a reasonable degree of medical probability, the proximate cause of harm to the plaintiff. Germann v. Matriss, 55 N.J. 193, 208 (1970); see also Pelose v. Green, 222 N.J. Super. 545, 550-51 (App. Div. 1988). The same proofs are necessary to prove professional negligence by a physical therapist.³

The testimony regarding proximate causation may be provided by either an expert witness retained by plaintiffs for the litigation or a treating physician. See Stigliano v. Connaught Labs, Inc., 140 N.J. 305, 314 (1995) ("Because the determination of the cause of a patient's illness is an essential part of diagnosis and treatment, a treating physician may testify about the cause of a patient's disease or injury.").

Expert testimony regarding proximate causation is "an integral and indispensable part of plaintiff's case." Parker v. Goldstein, 78 N.J. Super. 472, 484 (App. Div. 1963). Here,

³ Physical therapists are governed by the Physical Therapist Licensing Act, N.J.S.A. 45:9-37.11 to -37.34(f). They must be licensed to practice physical therapy, N.J.S.A. 45:9-37.19, and meet continuing education requirements. N.J.S.A. 45:9-37.34(f). Claims against physical therapists are subject to the affidavit of merit requirements imposed by N.J.S.A. 2A:53A-27. N.J.S.A. 2A:53A-26(k).

plaintiffs did not retain a proximate causation expert. Instead, they relied on Dr. Pepe, plaintiff's treating physician. Noticeably absent from Dr. Pepe's report was any opinion or indication that the rotator cuff tear, post-operative adhesive capsulitis, stiffness, or other alleged injuries suffered by Ames were the product of the overly aggressive therapy by Rehab. The complete absence of explanation by Dr. Pepe "of how, and in what manner," the overly aggressive physical therapy "caused or contributed to" Ames' injuries "left an irreparable void in plaintiff[s'] proof." See *ibid.* Absent that opinion, plaintiffs cannot prove one of the essential elements of their case. Accordingly, the trial court properly granted summary judgment dismissing plaintiffs' claims against Rehab.

Affirmed.

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


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