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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-2403-15T2

EMANUEL SKOUNAKIS, Individually
and as Administrator ad
Prosequendum of the Estate
of MICHELLE SKOUNAKIS,

Plaintiffs-Appellants.

v.

MELISSA SOTILLO, M.D., WOMEN'S
HEALTH CARE ASSOCIATES, PA,
DR. G'S FRANCHISING COMPANIES,
LLC,¹

Defendants-Respondents.

Argued December 12, 2017 – Decided March 19, 2018

Before Judges Fisher, Sumners and Moynihan.

On appeal from Superior Court of New Jersey,
Law Division, Sussex County, Docket No.
L-0326-12.

Thomas S. Howard argued the cause for
appellants (Gartenberg Howard, LLP,
attorneys; Thomas S. Howard and Steven R.
Vanderlinden, on the brief).

Evelyn C. Farkas argued the cause for
respondent Dr. Melissa Sotillo, M.D. (Farkas

¹ Improperly pled as Dr. G's Franchising Company d/b/a Dr. G's
Weight Loss And Wellness.

& Donohue, LLC, attorneys; Christine M. Jones, on the brief).

Glenn A. Farrell argued the cause for respondent Women's Health Care Associates, PA (Calcagno & Associates, LLC, attorneys, join in the brief of respondent Dr. Melissa Sotillo, M.D.).

Craig S. Combs argued the cause for respondent Dr. G's Franchising Companies, LLC (Giblin, Combs & Schwartz, LLC, attorneys; Erica C. Avondoglio, on the brief).

PER CURIAM

Following a computer software program titled Weight Loss & Wellness Program (the program) designed by Dr. G's Franchising Companies, LLC, (Dr. G's), Dr. Melissa Sotillo, M.D., prescribed Cytomel to Michelle Skounakis for weight loss management after her almost six months of weight loss treatment had plateaued. Michelle² had previously been prescribed phendimetrazine and other medications. Within fifteen days of being prescribed Cytomel, Michelle died from cardiac occlusion. The autopsy attributed her cause of death to closure of her left main coronary at its ostia because of a total occlusion with organizing thrombus and atherosclerotic plaque.

² We refer to the Skounakis by their first names to avoid any confusion due to their shared last name. We mean no disrespect in doing so.

Michelle's widower, Emanuel Skounakis, individually and as administrator ad prosequendum of the estate of Michelle Skounakis, (collectively plaintiff) filed a medical malpractice and negligence action under the Wrongful Death Act, N.J.S.A. 2A:31-1 to -6, against Dr. Sotillo and her practice, Women's Health Care Associates, PA, (collectively Dr. Sotillo) and Dr. G's as well as ABC Corporations 1-10, John Does 1-10, and Jane Does 1-10. In support of his claims, Emanuel retained two liability experts, Christine Stork, Pharm.D. and Bruce M. Decter, M.D. Dr. Stork authored a report providing that phendimetrazine decreases the arterial vessel diameter and increases sheering forces in the arterial vessel, and directly increases heart rate; and that Cytomel, in excess amounts can elevate heart rate, and should not be used for weight control as indicated on its black box warning. Dr. Decter, an internist and board certified cardiologist,³ authored expert reports maintaining that Dr. Sotillo, as a general practitioner, not in her board certified specialty of obstetrics/gynecology (OB/GYN), deviated from the standard of care by: (1) failing to perform a full history and physical of Michelle; (2) prescribing the medications in the Dr. G's weight loss plan despite Michelle not fitting the criteria in the informed consent

³ He is also a Clinical Assistant Professor of Medicine at Hofstra North Shore-LIJ School of Medicine at Hofstra University.

form; and (3) prescribing Cytomel for the use of weight loss in combination with phendimetrazine. Notably, he opined that the combination of "phendimetrazine and Cytomel[] [was] the proximate cause of the rupture of the atherosclerotic plaque leading to the thrombus formation and the occlusion of the left main coronary artery which was the direct cause of [Melissa's] death." As to Dr. G's, Dr. Decter contended its program deviated from the standard of care by including the combination of phendimetrazine and Cytomel despite their "well known" combined negative effects.

Following a three-year discovery period, the motion court granted defendants' motions to bar Dr. Decter's opinions on the basis that he was not qualified to render opinions as to the treatment rendered by Dr. Sotillo as a general practitioner; and to Dr. G's because he was not a computer software expert. Furthermore, the court barred Dr. Decter's opinions as net opinions. The court also denied plaintiff's request for an extension of time to retain another expert in lieu of Dr. Decter's excluded opinions. Defendants then filed summary judgment motions to dismiss plaintiff's complaint, which a different court granted due to the lack of an expert report to support the malpractice and negligence claims. Because we agree with plaintiff's contention that Dr. Decter was qualified to render his opinions, that his reports should not have been barred as net opinions, and that

summary judgment should not have been granted, we reverse and remand for trial.

Starting with the issue of Dr. Decter's qualifications, we conclude the motion court mistakenly applied its discretion to find that the doctor was not qualified to offer an expert opinion regarding the treatment rendered by Dr. Sotillo and the medication recommendations of Dr. G's program. See Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 411 (1960) (a trial court's decision on an expert's qualifications is not overturned on appellate review absent an abuse of discretion). To inform us in determining whether Dr. Decter was qualified to render opinions in this matter, we look to the Affidavit of Merit (AOM) statute, N.J.S.A. 2A:53A-27, and the New Jersey Medical Care Access and Responsibility and Patients First Act (PFA), N.J.S.A. 2A:53A-37 to -42.

The AOM statute requires a plaintiff in a medical malpractice or medical negligence action to serve on a defendant, "an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices." N.J.S.A. 2A:53A-27. The PFA principally ensures that a "challenging expert" who provides an expert opinion or executes an AOM is "equivalently-

qualified to the defendant physician." Buck v. Henry, 207 N.J. 377, 389 (2011) (quoting Ryan v. Renny, 203 N.J. 37, 52 (2010)). N.J.S.A. 2A:53A-41, in pertinent part, provides:

In an action alleging medical malpractice, a person shall not give expert testimony or execute an affidavit pursuant to the provisions of [N.J.S.A. 2A:53A-26 to -29] on the appropriate standard of practice or care unless the person is licensed as a physician or other health care professional in the United States and meets the following criteria:

a. If the party against whom or on whose behalf the testimony is offered is a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association and the care or treatment at issue involves that specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association, the person providing the testimony shall have specialized at the time of the occurrence that is the basis for the action in the same specialty or subspecialty, recognized by the American Board of Medical Specialties or the American Osteopathic Association, as the party against whom or on whose behalf the testimony is offered, and if the person against whom or on whose behalf the testimony is being offered is board certified and the care or treatment at issue involves that board specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association, the expert witness shall be:

. . . .

(2) a specialist or subspecialist recognized by the American Board of

Medical Specialties or the American Osteopathic Association who is board certified in the same specialty or subspecialty, recognized by the American Board of Medical Specialties or the American Osteopathic Association, and during the year immediately preceding the date of the occurrence that is the basis for the claim or action, shall have devoted a majority of his professional time to either:

(a) the active clinical practice of the same health care profession in which the defendant is licensed, and, if the defendant is a specialist or subspecialist recognized by the American Board of Medical Specialties or the American Osteopathic Association, the active clinical practice of that specialty or subspecialty recognized by the American Board of Medical Specialties or the American Osteopathic Association; or . . .

. . . .

b. If the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, shall have devoted a majority of his professional time to:

(1) active clinical practice as a general practitioner; or active clinical practice that encompasses the medical condition, or that includes performance of the procedure, that is the basis of the claim or action; or . . .

[Emphasis added.]

Thus, where the defendant physician's treatment is outside his or her specialty, the standard of care to be applied is that of a general practitioner. See Buck, 207 N.J. at 391 ("[the defendant] physician may practice in more than one specialty, and the treatment involved may fall within that physician's multiple specialty areas. In that case, an affidavit of merit from a physician specializing in either area will suffice.").

The parties here agree that the standard of care applied to Dr. Sotillo's weight loss treatment to Melissa is that of a general practitioner, not in her Board certified specialty of OB/GYN or weight loss management, which is not a recognized medical specialty. Although at their second Ferreira⁴ conference, a different court put on the backburner the ultimate issue of Dr. Decter's qualifications, it was recognized that Dr. Decter "was offering his viewpoint in the [AOM] as . . . a general practitioner beyond the scope of his specialty as an internist/cardiologist." We presently see no basis for the motion court's oral opinion that Dr. Decter "does not have the ability to make that opinion because . . . he admits throughout his deposition, he's not qualified[.]" Our review of the motion record reveals that Dr. Decter was

⁴ A conference held in the early stages of a malpractice action, between the trial court and the parties, in accordance with Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003), to address any concerns about the AOM.

qualified under N.J.S.A. 2A:53A-41(b) to render an opinion as to the standard of the general practice of medicine governing Dr. Sotillo's treatment, because "the majority of his time in the one year preceding Michelle['s] . . . treatment with Dr. Sotillo was devoted to the active clinical practice of medicine" including the prescription of "medications to patients, which [involved] assessing the risks and the benefits associated." We understand that Dr. Decter did not spend the majority of his twenty-one year professional career in active clinical practice as a general practitioner, as it was primarily devoted to cardiology. We are also aware that Dr. Decter has limited experience with prescribing Cytomel – only for thyroid disease – and that he has never prescribed the other medications prescribed to Melissa. Yet, these factors go to the strength or believability of his testimony, not its admissibility. The same thought applies to defendants' assertions that Dr. Decter is unqualified because he has no knowledge of pharmacology, and never treated a patient for weight loss. Even though the doctor is up front about his reliance upon Dr. Stork's pharmacological opinions, his opinions are from the perspective of a general practitioner who does not treat patients seeking professional guidance to lose weight.

As to Dr. Decter's qualifications regarding Dr. G's program, the motion court remarked,

And certainly as to the software itself, . . . there is no expert opinion as to any – from anyone about the software being grossly defective – or defective whatsoever. There's no testimony about it, there's nothing in the record about it, and Dr. Decter cannot possibly opine about the efficacy of the software.

We, however, find no reason to conclude Dr. Decter was unqualified to render an opinion regarding Dr. G's program because he was not a computer software expert. The thrust of his concern about Dr. G's program was its endorsement that Melissa take the combination of medications that he believed led to her death. His opinion offers no – and need not offer any – insight about the details of Dr. G's computer software; he only discourses on whether the medications were appropriate for Melissa's quest to lose weight. Considering his clinical practice experience, Dr. Decter is qualified to opine regarding the propriety of the medications recommended by Dr. G's program.

Turning to the opinions offered by Dr. Decter, we conclude the motion court mistakenly applied its discretion to exclude his expert testimony. See Townsend v. Pierre, 221 N.J. 36, 52 (2015) (a motion court's decision to admit or exclude evidence turns on whether it abused its discretion). We realize that under N.J.R.E. 703, an expert opinion must "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.'" Id. at 53 (quoting Polzo v Cty. of Essex, 196 N.J. 569, 583 (2008)). From this evidentiary standard, the net opinion rule has developed, to "forbid[] the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." Polzo, 196 N.J. at 583. That is, an expert must "explain a causal connection between the act or incident complained of and the injury or damages allegedly resulting therefrom." Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). Expert testimony that is "based merely on unfounded speculation and unquantified possibilities" should be barred. Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 300 (App. Div. 1990). Simply put, experts must "give the 'why and wherefore'" of their opinions, not "mere conclusion[s]." Koruba v. Am. Honda Motor Co., 396 N.J. Super. 517, 526 (App. Div. 2007).

Under these parameters, the motion court should not have barred Dr. Decter's opinions that defendants' deviation from the appropriate standard of care in having Melissa take Cytomel and phendimetrazine to lose weight was the cause of her death. Dr. Decter opined that Dr. Sotillo deviated from the standard of care by: not conducting a full history and physical of Melissa;

prescribing medication to Melissa to lose weight when her body mass index was not 30 or greater as indicated in the informed consent; and not being aware Cytomel contained a black box warning that if used for weight loss in large doses, it could be life threatening. In relying upon Dr. Stork's opinion about the effects of prescribing the combination of Cytomel and phendimetrazine on artery vessels, Dr. Decter concluded that the medications increased Melissa's heart rate, triggering "the tearing of the small atheromatous plaque that she had in the left main coronary artery" and "the formation of a thrombus leading to the complete occlusion of the left main coronary artery which resulted in her sudden death." This clearly sets forth Dr. Decter's opinion as to the "whys" and "wherefore" of how Dr. Sotillo's care caused Melissa's death. Since Dr. Sotillo's medication prescriptions were in adherence to Dr. G's program, we likewise conclude it was not net opinion for Dr. Decter to also assert that Dr. G's negligence caused Melissa's death.

Because we have determined Dr. Decter should have been permitted to provide his expert opinion that the negligence of Dr. Sotillo and Dr. G's proximately caused Melissa's death, it is unnecessary to address plaintiff's alternative argument that discovery should be re-opened to allow him to obtain another expert to render opinions. Lastly, since Dr. Decter should have been

permitted to provide his expert opinion, summary judgment should not have been granted to dismiss plaintiff's complaint.

Reversed and remanded for trial.

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

A handwritten signature in black ink, appearing to be the initials 'JMA'.

CLERK OF THE APPELLATE DIVISION