SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2892-16T2

S.M., a minor,
by his Guardian ad Litem,
S.M.,

Plaintiff-Appellant,

v.

TOWNSHIP OF IRVINGTON
BOARD OF EDUCATION,

Defendant-Respondent.

Submitted February 6, 2018 – Decided May 4, 2018

Before Judges Hoffman and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-7014-12.

Martin F. Kronberg, PC, attorneys for appellant (Martin F. Kronberg, on the brief).

Hunt, Hamlin & Ridley, attorneys for respondent (Ronald C. Hunt, on the brief).

PER CURIAM

Plaintiff, S.M. (Sean),[1] a minor, by his father and guardian ad litem, appeals from a February 3, 2017 order granting a directed verdict in favor of defendant Township of Irvington Board of Education (Board) and dismissing plaintiff's claims. The trial court struck the testimony of one of plaintiff's experts as a net opinion. Without that testimony, plaintiff could not establish causation between the alleged negligence of a school nurse, who was a Board employee, and the child's injuries. We agree that the expert provided nothing more than a net opinion and that, as a result, plaintiff failed to prove that the nurse's alleged negligence caused or contributed to the child's injuries. Accordingly, we affirm.

I.

This tragic case arises out of injuries suffered by Sean, which left him partially paralyzed. On April 15, 2011, Sean, who at the time was seven years old and in first grade, hit his head on a gate at his school playground during school hours. He was examined by the school nurse, who observed no physical signs of injury and determined that he was able to return to class. The nurse then checked Sean several times throughout the day and found no bumps, bruises, or other signs of physical injury. The nurse

[1] To protect the privacy interests of the child, we use a fictitious name.

gave Sean a note to take home to his father. The note informed that Sean had hit his head and recommended that the father should monitor Sean for certain signs, and if those signs manifested themselves, Sean should be examined by a physician or taken to an emergency room. Sean never gave the note to his father. Instead, the father found the note in Sean's backpack several months later.

Sean attended school for over a week following his head bump. He did not complain of any pain. Nine days after Sean hit his head, on Sunday, April 24, 2011, Sean was using an exercise machine at his home. Thereafter, Sean told his father that his back hurt, and he began to fall down and had trouble getting up. The next morning, on April 25, 2011, Sean was unable to stand, and his father took him to the emergency room at a hospital.

At the hospital, the father reported that Sean had hurt himself while using an exercise machine.[2] Sean was examined by emergency room personnel on April 25, 2011, who consulted by telephone with Sean's treating pediatrician, Dr. Francois.

Dr. Francois physically examined Sean the next day on April 26, 2011. By April 27, 2011, Sean's condition had not improved. Dr. Francois consulted with a neurologist, and the doctors agreed

[2] In their briefs, the parties describe the exercise machine as a rowing machine. The hospital records, however, sometimes refer to an "exercise bike" and other times refer to it as a "rowing machine."

that Sean should have a magnetic resonance imaging (MRI) examination of his spine. The MRI exam was conducted the next morning on April 28, 2011. It revealed an epidural hematoma in a section of Sean's spinal cord. An operation was immediately performed. As a result of the damage caused by the epidural hematoma, Sean is partially paralyzed and needs to use a wheelchair.

In September 2012, plaintiff filed a complaint alleging that the Board was negligent and that the negligence contributed to Sean's injuries. Over the ensuing years, plaintiff amended the complaint several times to add various healthcare providers and physicians as defendants. The claims against the healthcare providers and physicians were all settled or dismissed. Thus, when the case was tried in December 2016, the Board was the only remaining defendant.

Plaintiff stipulated that the incident on the school playground, which occurred on April 15, 2011, was not the cause of the physical condition that sent Sean to the emergency room on April 25, 2011. Indeed, the trial judge repeatedly instructed the jury that the parties stipulated that the event on the schoolyard had nothing to do with, and did not cause, the epidural hematoma. Instead, plaintiff contended that (1) the school had a duty to directly contact Sean's father concerning Sean's head injury; (2)

if the school had directly notified Sean's father, the father would have shared that information with the emergency room personnel and Sean's pediatrician on April 25, 2011; (3) those medical personnel then would have immediately either ordered an MRI or consulted with a neurologist, who would have ordered an MRI; and (4) Sean would have been operated on April 25, 2011, and he would have suffered less damage to his spinal cord.

To support those contentions, plaintiff called two expert witnesses. Dr. Gary Belt, a neurologist, testified about Sean's spinal injury and his partial paralysis. Dr. Belt then opined that an earlier consultation with a neurologist would have led the neurologist to order an MRI prior to April 28, 2011. Finally, Dr. Belt testified that an earlier surgery on Sean's hematoma would have allowed Sean to have a better recovery. In that regard, Dr. Belt opined that Sean would have been able to walk with the assistance of a device, rather than have to use a wheelchair.

Dr. Wendy Chabot, a pediatrician, testified that if the emergency room personnel and Sean's treating pediatrician were informed on April 25, 2011, of Sean's head injury at school, the standard of care would have required them immediately to order an MRI of Sean's spine or to consult with a neurologist.

In addition to the testimony from the two expert witnesses, plaintiff's counsel read excerpts from the depositions of the

school nurse, Sean's first grade teacher, and the principal of Sean's school. Sean and his father also testified.

At the close of plaintiff's case, the Board moved to strike Dr. Chabot's testimony and for a directed verdict, contending that no evidence established proximate cause. The trial judge found that Dr. Chabot's testimony was a net opinion because there was no factual foundation for her opinion that the healthcare professionals would have done something different on April 25, 2011, if they were told that Sean hit his head on the school playground ten days earlier. The trial court then ruled that without Dr. Chabot's testimony concerning causation, plaintiff had no proof that the alleged negligence of the school nurse was a substantial factor in causing or contributing to Sean's injuries. In that regard, the trial court reasoned: "The argument that the school's failure to call [the father] is the proximate cause of the child's paralysis in the [c]ourt's view strains proximate cause beyond its rational limits." Accordingly, the trial court granted a directed verdict in favor of the Board and, on February 3, 2017, entered an order memorializing that decision.

II.

Our review of the trial court's decision on a motion for a directed verdict is guided by the same standard that governs the trial court. Frugis v. Bracigliano, 177 N.J. 250, 269 (2003). In

ruling on a directed verdict, a court is to accept as true all evidence presented by the non-moving party, along with the legitimate inferences drawn from those facts, and determine whether the proofs are sufficient to sustain a judgment in favor of the moving party. Smith v. Millville Rescue Squad, 225 N.J. 373, 397 (2016).

The determination of whether an expert's testimony is admissible is, generally, left to the sound discretion of the trial court. Townsend v. Pierre, 221 N.J. 36, 52 (2015) (citing State v. Berry, 140 N.J. 280, 293 (1995)). Accordingly, appellate courts "apply [a] deferential approach to a trial court's decision to admit expert testimony, reviewing it against an abuse of discretion standard." Id. at 53 (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371-72 (2011)).

N.J.R.E. 702 and 703 frame the analysis for determining the admissibility of expert testimony. N.J.R.E. 702 allows opinion testimony from experts qualified in their fields. N.J.R.E. 703 addresses the foundation for expert testimony. Expert opinions 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.'" Townsend, 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.'" Id. at 53-54 (alteration in original) (quoting Polzo, 196 N.J. at 583). Therefore, courts require an expert to "'give the why and wherefore' that supports the opinion[.]" Id. at 54 (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)). Accordingly, for their opinions to be admissible, expert witnesses 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." Ibid. (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992)). In short, the net opinion rule prohibits "speculative testimony." Harte v. Hand, 433 N.J. Super. 457, 465 (App. Div. 2013) (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997)).

On appeal plaintiff argues that (1) Dr. Chabot's testimony was not a net opinion and should not have been stricken; (2) the trial court's finding that Dr. Chabot's opinion had no factual basis because the schoolyard head injury did not cause the epidural hematoma was an error; and (3) if the school had not failed to notify Sean's father of his head injury, Sean would have had a

significantly better recovery because the surgery would have been conducted earlier. Although framed as three arguments, plaintiff essentially makes but one: Dr. Chabot had a basis to offer her opinion on the standard of medical care and, thus, the issue of causation should have gone to the jury. We disagree.

To establish a cause of action for negligence, plaintiff must prove four elements: "(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages." Townsend, 221 N.J. at 51 (quoting Polzo, 196 N.J. at 584). Here, causation is the key issue.

Plaintiff did not claim that any Board personnel committed medical malpractice. Indeed, plaintiff stipulated that Sean's head injury on April 15, 2011, was not a cause of the epidural hematoma. Instead, plaintiff claimed that the school's negligence was the first step in a four-step causal chain of events. Specifically, plaintiff contends that (1) the school negligently failed to communicate directly with Sean's father about Sean hitting his head on April 15, 2011; (2) that failure caused Sean's father not to provide that information to the treating medical personnel on April 25, 2011; (3) that omission caused the medical personnel not to immediately order an MRI exam or consult with a neurologist; and (4) those failures led to a delay in the operation and greater damage to Sean's spinal cord.

Dr. Chabot's testimony went to the third step in that causal chain. Dr. Chabot testified that if the treating medical personnel had been told of Sean's head injury, the standard of care would have required them to either immediately order an MRI or consult with a neurologist on April 25, 2011.

The problem with that testimony is that it lacked any factual support in the record. Plaintiff did not present testimony from any of the medical professionals who treated Sean on April 25, 2011, including any testimony from Sean's pediatrician, Dr. Francois. Moreover, Dr. Chabot did not testify that she had spoken with any of the treating physicians, nor was there anything in the medical records reflecting what those medical professionals might have done if they had been told of Sean's prior head injury. Thus, Dr. Chabot had no factual basis to testify about what the treating medical personnel would have done on April 25, 2011.

To try to address that gap, Dr. Chabot testified about what she believed was the governing medical standard of care. Normally, a doctor's testimony concerning the applicable medical standard of care is sufficient to present a question for a jury in a medical malpractice action. See Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 407 (2014) (explaining that in a medical malpractice case, plaintiff must establish for the jury, through expert testimony, the applicable standard of care). Here, however,

plaintiff was not asserting a medical malpractice claim against the Board. Instead, plaintiff claimed that the school nurse was negligent in failing to call Sean's father. Thus, plaintiff needed to show that there was a causal link between the nurse's inaction and Sean's injury. Critically, it was stipulated that the head injury was not a cause of the epidural hematoma in Sean's spinal cord. Consequently, there were no facts linking the Board's alleged negligence to Sean's injuries.

Plaintiff wanted to ask the jury to draw an inference about what the treating medical personnel might have done if they had been told that Sean hit his head at school ten days earlier. Inferences are often legitimate and can present a jury question in the right context. See Reynolds v. Gonzalez, 172 N.J. 266, 284 (2002) (finding a jury question where plaintiff presents "evidence or reasonable inferences therefrom showing a proximate causal relation between defendant's negligence" and plaintiff's harm (citation omitted)). "There are, however, limits to the permissible inferences that may be extracted from experts' testimony." Johnson v. Salem Corp., 97 N.J. 78, 91 (1984). Indeed, we have explained that an expert must have a factual foundation to draw a causal link between a defendant's actions or inactions and a plaintiff's injury. Otherwise, such expert testimony "is no more than speculation —— speculation surrounded

by expertise but, nonetheless, speculation." Pelose v. Green, 222 N.J. Super. 545, 550 (App. Div. 1988); see also State v. Corby, 28 N.J. 106, 113-14 (1958) (explaining that "[a]n inference is a deduction which may or may not be made from certain proven facts").

Three cases, where we have affirmed the exclusion of expert testimony, illustrate that an expert must provide a factual foundation to allow a jury to draw a permissible inference. See Pelose, 222 N.J. Super. 545; Anderson v. Somberg, 158 N.J. Super. 384 (App. Div. 1978); Parker v. Goldstein, 78 N.J. Super. 472 (App. Div. 1963). In Parker, the plaintiff alleged that his wife died as a result of the defendant doctor's delay in performing a Caesarean section. The plaintiff's expert testified that the defendant deviated from the standard of care by failing to perform the Caesarean section at the time the wife was admitted to the hospital or soon thereafter, and that the deviation led to the wife's death from a pulmonary embolism. We affirmed the dismissal of the case because the expert had no explanation of how the delay contributed to the formation of the embolism. Accordingly, we pointed out that the lack of a factual foundation by the plaintiff's expert "left an irreparable void in plaintiff's proof. Acceptable medical opinion of causation supported by expert explanation was an integral and indispensable part of plaintiff's case." Parker, 78 N.J. Super. at 484.

In Anderson, we affirmed the dismissal of a wrongful death claim where the plaintiff's expert attributed the decedent's premature death to the stress of a second operation to remove a broken surgical instrument. We pointed out, however, that the proposed expert opinion was "without any proof" and, thus, was "sheer conjecture." Anderson, 158 N.J. Super. at 399-400.

Finally, in Pelose, we affirmed the dismissal of a malpractice claim because the plaintiff's expert had no factual basis to link the alleged inexperience of the defendant doctor to the plaintiff's injury. The plaintiff's theory was that he was injured by surgically-induced trauma and that the defendant surgeon was not qualified to do the surgery. The plaintiff's expert, however, lacked any factual foundation linking the defendant's inexperience to the trauma. We affirmed the dismissal of the malpractice claim, explaining that to allow such testimony effectively would ask the jury to engage in speculation. Pelose, 222 N.J. Super. at 550-51.

Here, the inference plaintiff sought to draw would have engendered speculation. As pointed out, there were no facts concerning what the treating medical personnel would have done if they were informed of Sean's prior head injury. Those medical personnel were independent actors and had no relationship to the Board. In such a situation, it was insufficient to suggest that those medical personnel may have acted a certain way. Plaintiff

needed to prove that they would have acted. In other words, had the issue been submitted to the jury, the jury would have been asked to speculate as to what the treating medical personnel might have done.

Indeed, two facts in this case illustrate this point. One of the doctors who examined Sean on April 25, 2011, recommended that an MRI be conducted. That recommendation was not followed because no MRI was conducted on that day. Thus, the jury would have been left to speculate that if the doctors were told that Sean hit his head ten days before, they would have done something that they had already decided not to do; that is, ordered an MRI exam.

Second, before settling with the treating physicians, plaintiff asserted that those physicians committed malpractice by not ordering an MRI or not consulting with a neurologist sooner. Thus, plaintiff contended that those independent actors did not follow the governing medical standard of care when presented with information that should have caused them to order an MRI. Consequently, it would have been asking the jury to speculate that given a different piece of information —— that is, that Sean hit his head ten days earlier —— the same medical personnel would have followed the alleged governing medical standard of care.

In short, because the head injury on April 15, 2011, had no direct medical causation to the spinal injuries that Sean suffered, the jury would have been asked to speculate what the medical personnel would have done with that information, if they were told about it on April 25, 2011.

Independently and alternatively, the trial record did not establish the governing standard of medical care. Dr. Chabot did not testify in any detail about the governing medical standard of care. Indeed, she first tried to testify as to what the treating medical personnel would have done. The trial judge correctly held that such testimony was inadmissible speculation. Dr. Chabot then testified that she believed the governing standard of care would have required the doctors to order an MRI or to consult with a neurologist. Nowhere in her testimony, however, did Dr. Chabot establish the basis for such a medical standard of care. In that regard, there was no reference to any training or experience that she had in ordering MRIs in such situations or in consulting with neurologists. Dr. Chabot also did not point to any learned treatises or peer-reviewed medical literature. Given that plaintiff's theory was that a competent physician would have ordered an MRI or consulted with a neurologist, Dr. Chabot needed to establish a basis for that testimony. Townsend, 221 N.J. at 53-54. Here, no such basis was offered.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION