SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4215-15T2

PETER KARANASOS, Administrator ad Prosequendum for the ESTATE OF DELORES KARANASOS and DELORES KARANASOS,

Plaintiffs-Appellants,

v.

MERIDIAN HEALTH, MERIDIAN SUB-ACUTE REHABILITATION AT WALL, and TARA HANLEY, R.N.,

Defendants-Respondents,

and

CAROL MORGAN, R.N., NICOLE MOLLEMA R.N., RUTH KEARNY, R.N., and YONG SHI, M.D.,

Defendants.

Submitted February 27, 2018 – Decided May 1, 2018

Before Judges Yannotti, Carroll and DeAlmeida.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-4274-11.

Shebell & Shebell, LLC, attorneys for appellants (John H. Sanders, II, of counsel and on the brief).

Widman, Cooney, Wilson, McGann & Fitterer, attorneys for respondents Meridian Health, Meridian Sub-Acute Rehabilitation at Wall and Tara Hanley, L.P.N. (Joseph K. Cooney, of counsel and on the brief).

PER CURIAM

Plaintiff appeals from a judgment of no cause for action entered by the trial court on April 4, 2016, and an order entered by the court on May 17, 2016, which denied his motion for a new trial. For the reasons that follow, we affirm.

I.

On August 27, 2009, Delores Karanasos underwent an endovascular abdominal aortic aneurysm stent procedure at Jersey Shore University Medical Center (JSUMC), after which the physician performed a femorofemoral bypass graft to maintain circulation of the right leg. Mrs. Karanasos was thereafter transferred to Meridian Health and Meridian Sub-Acute Rehabilitation at Wall (Meridian) for care. While at Meridian, Mrs. Karanasos fell twice. She was re-admitted to JSUMC, where she had surgery to repair the graft. Mrs. Karanasos later developed an infection, became septic, and died on December 11, 2009.

Plaintiff Peter Karanasos, the administrator ad prosequendum for Mrs. Karanasos's estate, filed a wrongful death and

survivorship action against Meridian, Meridian nurse Tara Hanley, and others. Plaintiff alleged defendants failed to provide care to Mrs. Karanasos in accordance with accepted professional standards and that, as a direct and proximate result of their negligence, Mrs. Karanasos sustained severe physical and emotional injuries and ultimately died.

Plaintiff asserted claims on behalf of Mrs. Karanasos, as well as survivorship claims on behalf of her dependents. It appears that plaintiff's claims against all defendants other than Meridian and Hanley were resolved, and the claims against these defendants were tried before a jury.

At the trial, evidence was presented that in May 2009, Mrs. Karanasos was admitted to JSUMC, and she came under the care of Dr. Yong Shi. Both of Mrs. Karanasos's legs were infected with cellulitis, and tests revealed she had an abdominal aortic aneurysm, which is a bulge in the main artery that extends from the heart. Thereafter, Mrs. Karanasos came under the care of Dr. Anthony Squillaro, a cardiothoracic and vascular surgeon.

Dr. Squillaro decided to perform an endovascular procedure to address the aneurysm because Mrs. Karanasos had multiple conditions, including emphysema, chronic obstructive pulmonary disease (COPD), hypertension, diabetes, bradycardia tachycardia syndrome, and atrial fibrillation. Dr. Squillaro performed the

surgery on August 27, 2009. After he performed the procedure, Dr. Squillaro determined Mrs. Karanasos did not have a good pulse in her right leg. He opened one incision and observed blood, but the flow was not forceful. Dr. Squillaro also observed plaque in the artery and performed an angioplasty to remove the blockage. Dr. Squillaro determined that the blood flow was sufficient. He closed the incision, and Mrs. Karanasos was moved to the recovery room; however, tests indicated she had a diminished pulse in her right leg.

Dr. Squillaro then performed a femorofemoral bypass procedure, and installed an artificial graft from one leg to the other. Thereafter, Dr. Squillaro noted that the cellulitis in Mrs. Karanasos's lower legs was "just about" gone, but he observed that she had a fungal rash on her skin. Mrs. Karanasos was evaluated on September 1, 2009, and diagnosed with cellulitis of her lower extremities, which was treated with antibiotics. She remained at JSUMC for about two weeks.

On September 9, 2009, Mrs. Karanasos was transferred to Meridian and Hanley was one of the nurses responsible for her care. Hanley testified that when a patient is brought to Meridian, a nursing assessment is performed. She explained that as part of that process, Meridian performs a fall assessment. She stated that

> [a] fall assessment measure[s] the mental status of the patient, whether the patient had a history of falls, the ambulation elimination status or whether the patient could go to the bathroom without assistance, the vision status of the patient, the gait and balance status of the patient, the blood pressure of the patient, whether the patient was on medications and also whether the patient had any previous predisposing diseases.

Hanley said the patient is assigned a score, which is based on the seriousness of the fall risk. A high risk score is considered ten or higher. Mrs. Karanasos's initial score was fourteen. Hanley testified that a patient with a score of fourteen is given a fall care plan, which is known as a falling star plan.

Hanley noted that Mrs. Karanasos was using a nasal cannula and that she had COPD, which causes difficulty breathing. Hanley knew Mrs. Karanasos preferred to sit in a wheelchair at night because of her COPD, and she often slept in the wheelchair. In a report dated September 10, 2009, Hanley noted that a fall protocol and falling star care plan was in place for Mrs. Karanasos.

At 1:00 a.m. on September 14, 2009, another patient in Mrs. Karanasos's room called for assistance. When Hanley arrived, she found Mrs. Karanasos kneeling on the floor next to her wheelchair. Mrs. Karanasos told Hanley she had fallen asleep and slid out of her chair. Mrs. Karanasos did not have any complaints of pain or discomfort. Hanley determined that Mrs. Karanasos was not injured,

and she helped her get back into the wheelchair. She noted that Mrs. Karanasos's call bell was in reach.

After the fall, a written falling star care plan was prepared. Hanley explained, however, that even though the plan was in writing, a patient with a fall risk has a star posted outside the door and a star on the wristband to alert staff. Also, a call bell is always in reach, floors are cleared to prevent clutter, and alarms are set if needed. Hanley said these measures were in place before Mrs. Karanasos's first fall.

On September 16, 2009, Mrs. Karanasos fell again. Hanley testified that on that date, Mrs. Karanasos was in her wheelchair from 12:30 a.m. to 1:30 a.m. She helped her get back into bed. At 4:57 a.m., Hanley noted that Mrs. Karanasos again was sitting in her wheelchair. At 5:45 a.m., staff members heard a crash outside Mrs. Karanasos's room. Hanley responded and saw Mrs. Karanasos on the floor. She was hanging on to the side of the bed.

Hanley said Mrs. Karanasos had tripped over her oxygen tubing while attempting to go to the bathroom. She was assessed and no apparent injuries were found. After the second fall, Hanley completed another fall risk assessment. Mrs. Karanasos was given a score of sixteen.

Dr. Shi examined Mrs. Karanasos on September 16, 2009, and he did not observe any injuries. Dr. Shi examined her again on

September 18, 2009. He noted significant swelling and erythema oozing from blisters on her lower extremities. He determined that Mrs. Karanasos was not responding to medication. He decided that she should be returned to the hospital.

At the hospital, one of Dr. Shi's colleagues examined Mrs. Karanasos. He did not find any injury at her surgical sites. However, because her leg was swollen, the doctor was concerned she might have deep vein thrombosis. The doctor ordered an ultrasound, which indicated that Mrs. Karanasos had a pseudoaneurysm where the graft joined the vein.

Dr. Squillaro explained that a pseudoaneurysm is a collection of blood under the skin. On September 25, 2009, Dr. Squillaro performed a pseudoaneurysm repair. He did not see any infection at that time. The following day, Mrs. Karanasos's right leg was found to be acutely ischemic and discolored. It was determined that the procedure performed the previous day was occluded or cut off. A physician performed a phlebectomy. On September 27, 2009, Mrs. Karanasos required additional surgery. An anatomical bypass was performed.

In November 2009, Mrs. Karanasos was discharged from the hospital, but she was readmitted several days later. She was examined and it was determined that there was a "good flow" in the graft. The examining doctor did not believe she was having any

vascular issue. The doctor found, however, that Mrs. Karanasos was experiencing renal, respiratory, and heart failure. She died on December 11, 2009.

At trial, plaintiff alleged Meridian and Hanley deviated from the accepted standard of nursing care because they failed to: (1) create and implement an individualized fall care plan for Mrs. Karanasos when she was first admitted; (2) update and change the fall care plan after they assessed her; (3) create and implement an appropriate fall care plan after Mrs. Karanasos's first fall; (4) follow Meridian's fall prevention policies; and (5) increase the level of supervision and monitoring after the first fall. Plaintiff claimed these deviations caused Mrs. Karanasos to sustain certain injuries and ultimately resulted in her death.

In support of these claims, plaintiff presented testimony from Rosemarie Valentine, an expert in the field of nursing and administration for rehabilitation at subacute care centers. Plaintiff also presented testimony from Dr. Squillaro, Dr. Peter Scalia, and Dr. Shi. Defendants denied they deviated from any standards of care and maintained her injuries were due entirely to her preexisting conditions. They presented testimony from Dr. Roger Rossi, who specializes in physical medicine and rehabilitation.

The jury returned a verdict finding that plaintiff had not proven by a preponderance of the evidence that Meridian or Hanley deviated from the accepted standards of nursing care. Accordingly, on April 4, 2016, the court entered a judgment of no cause for action in favor of defendants. Later, plaintiff filed a motion for a new trial. After hearing oral argument, the trial judge placed her decision on the record and entered an order denying the motion. This appeal followed.

II.

On appeal, plaintiff argues that a new trial is required because the trial judge erred by denying his motion for a directed verdict on the issue of whether defendants deviated from the applicable standard of care. Plaintiff contends defendants' expert acknowledged that the standard of care requires a written fall care plan for patients who are at risk for falls. He argues that, because defendants did not have a written fall plan for Mrs. Karanasos before the first fall, the judge erred by refusing to enter a judgment in his favor on that issue.

Rule 4:40-1 provides that "A motion for judgment, stating specifically the grounds therefor, may be made by a party either at the close of all the evidence or at the close of the evidence offered by an opponent." The motion must be denied "if, accepting as true all the evidence which supports the position of the party

defending against the motion and according [that party] the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ." Dolson v. Anastasia, 55 N.J. 2, 5 (1969). We apply the same standard when reviewing the trial court's order on a motion for judgment under Rule 4:40-1. Luczak v. Township of Evesham, 311 N.J. Super. 103, 108 (App. Div. 1998).

Here, the trial judge did not err by denying plaintiff's motion. As the judge noted in the decision she placed on the record, at trial, plaintiff asserted five deviations from the standard of care, one of which was defendants' failure to have a written care plan in place for Mrs. Karanasos before her first fall.

The record shows that Dr. Rossi agreed that the standard of care required a written fall care plan for patients who are at risk for falls, and he acknowledged that there was no written fall care plan for Mrs. Karanasos before her first fall. He testified, however, that a fall risk assessment had been performed when she was admitted to Meridian, a fall care plan was in place, and the measures required by the standard of care had been implemented. These measures included the placement of a star on the door to Mrs. Karanasos's room and her wristband, which indicated she was at risk for falls. The nursing staff also instructed Mrs. Karanasos

on the use of the bell to call for assistance, and she was provided a low bed, with handrails.

Thus, Dr. Rossi testified that defendants did not deviate from the accepted standard of care. He stated that even though not in writing, a fall care plan was in place and implemented before Mrs. Karanasos's first fall. There may have been some inconsistency in Dr. Rossi's testimony, but that was an issue for the jury. We conclude the judge did not err by denying plaintiff's motion for a directed verdict.

Plaintiff further argues that the judge made inaccurate statements to the jury regarding the testimony pertaining to the alleged deviations from the standard of care. Plaintiff contends the judge erroneously stated that Dr. Rossi had testified that the nursing staff, including Hanley, complied with all applicable nursing standards of care.

As we have explained, Dr. Rossi testified that defendants did not deviate from the accepted standards of nursing care. Although Dr. Rossi conceded that the standard of care required a written care plan, he said the absence of a written plan does not mean that "other measures are not being performed." Therefore, the judge's statement to the jury was an accurate summary of Dr. Rossi's testimony.

III.

Plaintiff contends the judge erred by charging the jury pursuant to Scafidi v. Seiler, 119 N.J. 93 (1990). Under Scafidi, "a careful analysis . . . is required to determine whether the evidence is sufficient to permit a jury to decide, as a matter of reasonable medical probability, that both prongs of a two-part test are satisfied." Anderson v. Picciotti, 144 N.J. 195, 206 (1996).

The first prong requires evidence that the defendant deviated from the applicable standard of care and that such deviation increased the risk of harm to the plaintiff from an established pre-existing condition. Ibid. (citing Scafidi, 119 N.J. at 108-09). If that prong is satisfied, the jury must determine whether the deviation, in the context of the pre-existing condition, was "sufficiently significant in relation to the eventual harm to satisfy the requirement of proximate cause." Ibid. (citing Scafidi, 119 N.J. at 108-09).

The defendant has "the burden of segregating recoverable damages from those solely incident to the preexisting disease." Id. at 212 (quoting Fosgate v. Corona, 66 N.J. 268, 273 (1974)). The defendant must "demonstrate that the damages for which he [or she] is responsible are capable of some reasonable apportionment

and what those damages are." Id. at 208 (quoting Fosgate, 66 N.J. at 273).

On appeal, plaintiff argues that defendants failed to present evidence so that the jury could determine the percentage of Mrs. Karanasos's ultimate injury attributable to her preexisting conditions and the percentage attributable to the increased risk of harm resulting from their alleged deviations from the accepted standards of care. Plaintiff argues that without such evidence, the judge should not have charged the jury under Scafidi.

We note that on the verdict sheet, the jury was asked to determine whether plaintiff had proven that Hanley deviated from the accepted standards of nursing care. The jury then was asked to determine whether plaintiff had proven that Hanley's deviation increased the risk of harm posed by Mrs. Karanasos's preexisting conditions and, if so, whether the increased risk was a substantial factor in causing Mrs. Karanasos's ultimate injury. The jury was asked the same questions regarding Meridian.

The jury answered "No" to the first of these three questions as to both Hanley and Meridian. Thus, the jury found that plaintiff had not proven that Hanley or Meridian deviated from the accepted standards of nursing care. Therefore, the jury was not required to answer whether any such deviation increased the risk of harm posed by Mrs. Karanasos's preexisting conditions, or whether the

increased risk was a substantial factor in causing her ultimate injury.

Consequently, the jury was not required to determine the percentage of Mrs. Karanasos's ultimate injury attributable to her preexisting conditions and the percentage attributable to defendants' alleged deviations from the accepted standard of care. Because the jury never addressed these issues, the question of whether the judge erred by charging Scafidi is moot.

Plaintiff nevertheless argues that a new trial is warranted because the judge's Scafidi instruction may have confused the jury in addressing the initial questions on whether Hanley and Meridian deviated from the accepted standards of care. There is, however, nothing in the record indicating that the jury's determinations that Hanley and Meridian did not deviate from the accepted standards of care were the result of confusion engendered by the Scafidi charge.

In any event, for sake of completeness, we conclude that the judge did not err by charging the jury under Scafidi. As noted previously, defendants maintained that Mrs. Karanasos's ultimate injury was the result of her preexisting conditions and not attributable to any deviation on their part from the accepted standards of care. The testimony from Mrs. Karanasos's treating

physicians indicated that after the initial surgical procedures, Mrs. Karanasos was at risk of graft failure and infection.

Dr. Squillaro also noted that when Mrs. Karanasos was readmitted to JSUMC, she was diagnosed with a pseudoaneurysm. Dr. Squillaro did not know what caused that condition, but he testified that the sutures were torn. He acknowledged that the tear need not be traumatically induced. It was, he explained, a known complication at the graft site.

The evidence showed that Mrs. Karanasos had peripheral artery disease, venous insufficiency, and small arteries, which increased the risk of graft failure. She also had other conditions that increased the risk of infection at the graft site. Also, Mrs. Karanasos had been examined after both falls and no apparent injuries were found. Furthermore, Dr. Shi testified that Mrs. Karanasos was not injured in either fall.

Thus, there was sufficient evidence to allow the jury to consider whether any deviation by defendants increased the risk of harm to Mrs. Karanasos from her preexisting conditions. There also was sufficient evidence upon which the jury could make a reasonable determination as to the percentage of Mrs. Karanasos's ultimate injury that was due to her preexisting conditions and the percentage, if any, that was due to any deviation by defendants

from the standard of care. Therefore, the judge did not err by charging the jury under Scafidi.

We also note that the judge instructed the jury that "defendant is responsible for all of the plaintiff's injuries unless defendant is able to reasonably apportion the damages." The judge stated, "[I]f you find that defendants have not met the defendant's burden of proving that Mrs. Karanasos' injuries can be reasonably apportioned, the defendant is responsible for all of the harm or injury." There was sufficient evidence for the jury to apportion all or none of Mrs. Karanasos's ultimate injury to any deviation by defendants.

IV.

Next, plaintiff argues the trial judge erred by preventing Mrs. Karanasos's treating physicians from testifying about whether her falls caused an injury to her graft site. Plaintiff contends the limitation on this testimony requires a new trial.

"The admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Townsend v. Pierre, 221 N.J. 35, 52 (2015) (citing State v. Berry, 140 N.J. 280, 293 (1995)). We review the trial court's ruling under an abuse of discretion standard. Id. at 53 (citing Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371-72 (2011)).

"The testimony of a treating physician is subject to an important limitation. Unless the treating physician is retained and designated as an expert witness, his or her testimony is limited to issues relevant to the diagnosis and treatment of the individual patient." Delvecchio v. Twp. of Bridgewater, 224 N.J. 559, 579 (2016). Therefore, treating doctors may testify as fact witnesses

> about their diagnosis and treatment of [an injury], including their determination of that [injury]'s cause. Their testimony about the likely and unlikely causes of [an injury] is factual information, albeit in the form of an opinion. Because the determination of the cause of a patient's [injury] is an essential part of diagnosis and treatment, a treating physician may testify about the cause of a patient's disease or injury.
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> [Stigliano v. Connaught Labs., Inc., 140 N.J. 305, 314 (1995) (citation omitted).]

Here, plaintiff argues that the judge erred by limiting the testimony of Dr. Squillaro and Dr. Scalia. As noted, Dr. Squillaro performed various surgical procedures, including the surgery to repair the pseudoaneurysm near Mrs. Karanasos's graft site after she was readmitted to JSUMC. Dr. Scalia was present and assisted Dr. Squillaro in performing that procedure.

Plaintiff's attorney informed the judge he wanted to ask Dr. Squillaro a hypothetical question, based on Hanley's description of Mrs. Karanasos's falls and her condition at those times. The

attorney said he wanted to ask the doctor whether the falls "would cause the type of injury he saw when he performed this operation." Defendants objected to the question, and the trial judge sustained the objection.

The judge noted that Dr. Squillaro was testifying as a treating doctor and he had not issued a written opinion other than his operative report. She pointed out that plaintiff's attorney would be asking the doctor to opine on facts he did not personally observe, based on testimony elicited during the trial, when the doctor was not present. The judge found that it would be fundamentally unfair to allow Dr. Squillaro to provide an opinion when defendants did not have an opportunity to explore that opinion during the doctor's deposition.

It is well established "that [a treating physician] may not be asked to respond to purely hypothetical questions." Parker v. Poole, 440 N.J. Super. 7, 17 (App. Div. 2015) (quoting Roqotzki v. Schept, 91 N.J. Super. 135, 152 (App. Div. 1966)). As noted, plaintiff's attorney sought to ask the doctor a hypothetical question based on the testimony of another witness, which was provided when he was not present. The judge did not err by sustaining the objection to the question on that basis.

Plaintiff's attorney also sought to elicit testimony from Dr. Squillaro regarding the progression of sepsis. Defense counsel

objected to the question and the judge sustained the objection, ruling that it went beyond the permissible scope of the doctor's testimony. The judge noted that Dr. Squillaro had not been offered as an expert in the field of infectious disease, and he was not Mrs. Karanasos's treating physician at the time she developed sepsis. The judge stated that the progression of sepsis was not relevant to Dr. Squillaro's diagnosis and treatment of Mrs. Karanasos. The judge's ruling was consistent with Stigliano and not an abuse of discretion.

Plaintiff further argues that the judge erroneously prevented Dr. Scalia from testifying about his general knowledge and understanding of the medical procedure he performed and the risks attendant thereto. According to plaintiff, the judge's ruling limited the doctor to testifying in a vacuum. We disagree. The limits placed on Dr. Scalia's testimony were consistent with Stigliano. The judge's evidentiary ruling was not a mistaken exercise of discretion.

V.

Plaintiff argues that the judge erred by refusing to provide the jury with a "False In One - False In All" charge. Plaintiff contends Hanley made inconsistent statements about Mrs. Karanasos's falls in the medical chart and an occurrence report. In the chart, Hanley indicated that the chair and bed alarms were

in place for both falls. In the report, Hanley wrote that the alarms had not been in place.

Based on this inconsistency, plaintiff asked the judge to provide the jury with the "False In One – False In All" instruction. The judge denied the application. The judge stated that considering Hanley's testimony in its entirety, it would not be appropriate to instruct the jury "about a witness deliberately lying to the jury or willfully or knowingly testifying falsely."

A trial judge has the discretion to charge the jury on "False In One – False In All" if the judge "reasonably believes a jury may find a basis for its application." State v. Ernst, 32 N.J. 567, 584 (1960). "This rule is simply one of many aids which the trier-of-fact may utilize to evaluate the credibility of a witness." Capell v. Capell, 358 N.J. Super. 107, 111 n.1 (App. Div. 2003). "It should be used only when the trier-of-fact finds that the witness intentionally testifies falsely about a material fact." Ibid. (citing State v. Fleckenstein, 60 N.J. Super. 399, 408 (App. Div. 1960)).

Here, Hanley was questioned about and acknowledged the discrepancy between the medical chart and the occurrence report. Hanley did not provide false testimony at her deposition or at trial regarding the use of the bed and chair alarms. We therefore

conclude the judge did not err by denying the request for the "False In One – False In All" instruction.

VI.

Plaintiff argues that a new trial is required because the judge erred by refusing to charge the jury that a violation of the Patients' Bill of Rights can be considered evidence of negligence. "[T]he determination that a party has violated 'a statutory duty . . . is a circumstance which the jury should consider in assessing liability.'" Eaton v. Eaton, 119 N.J. 628, 642 (1990) (quoting Waterson v. Gen. Motors, 111 N.J. 238, 263 (1988)). "[T]he violation of a legislated standard of conduct may be regarded as evidence of negligence if the plaintiff was a member of the class for whose benefit the standard was established." Alloway v. Bradlees, Inc., 157 N.J. 221, 236 (1999).

At trial, Valentine testified that defendants' failure to prepare a written care plan for Mrs. Karanasos was a violation of State regulations. She cited a regulation, which she identified as "F Tag 483.35." It appears, however, that Valentine may have been referring to a federal regulation, 42 C.F.R. § 483.35, which applies to long-term care facilities and provides that such facilities must "have sufficient nursing staff with the appropriate competencies and skill sets to provide nursing and related services."

Valentine also testified that defendants violated the Patients' Bill of Rights because they did not provide Mrs. Karanasos with a safe and secure environment. Valentine did not, however, identify any specific regulation. Defendants assert that Valentine may have been referring to a provision of the State's Patient Bill of Rights, which generally requires that certain health care facilities provide patients with a safe and secure environment.

The trial judge denied plaintiff's application to charge the jury on the alleged regulatory violations because Valentine's testimony on such violations was "not particularly clear." Here, the record shows that Valentine either cited the wrong regulation, or failed to cite any regulation in support of her testimony. The judge found that the instruction was not warranted because Valentine's testimony on these issues lacked sufficient clarity and certainty. The record supports the judge's determination.

VII.

Plaintiff contends the judge's sua sponte decision to charge the jury on mitigation of damages was erroneous and requires a new trial. We note that the jury did not consider damages and, therefore, the issue is moot. However, for the sake of completeness, we will address the issue.

"In cases where a plaintiff is responsible, in whole or in part, for the harm or injury she suffers, the doctrines of comparative negligence, avoidable consequences, or superseding/intervening causation may serve to absolve a defendant of liability or limit [the defendant's] damages." Komlodi v. Picciano, 217 N.J. 387, 411 (2014) (citing Ostrowski v. Azzara, 111 N.J. 429, 436-38 (1988)). Unlike comparative negligence, the doctrine of avoidable consequences is not a defense to liability. Id. at 412. It serves only to mitigate damages. Ibid.

"Avoidable consequences will reduce a recovery because a plaintiff cannot claim as damages the additional injury [the plaintiff] causes to [himself or] herself after a defendant commits a tortious act." Id. at 412-13. For instance, "[a] plaintiff whose broken wrist is wrongly set by a surgeon cannot claim increased damages when, against doctor's orders, [the patient] causes additional harm to [the] wrist while playing tennis." Id. at 413.

In this case, plaintiff alleged defendants deviated from the accepted standards of care by failing to take sufficient action to protect Mrs. Karanasos from falling. Among other things, plaintiff alleged defendants failed to have a written care plan in place before Mrs. Karanasos's first fall. However, as we have explained, defendants established that they had a fall care

protocol in place and that it was being implemented before the first fall.

Moreover, the evidence showed that Mrs. Karanasos had full mental capacity, and she had been instructed to sleep in the bed rather than the wheelchair. She also had been instructed to use the bell to call for help when moving about. The judge correctly determined that in light of this evidence, the instruction on avoidable consequences was warranted.

The record supports the judge's ruling. If the jury determined that defendants had been negligent in failing to have a written care plan or other measures in effect before Mrs. Karanasos's falls, the jury could consider whether any damages resulting from Mrs. Karanasos's falls could have been avoided if she had followed the instructions given to her. Thus, the judge did not err by instructing the jury on mitigation of damages.

VIII.

Plaintiff contends the judge erred by failing to explain the absence of one of his attorneys during the trial. Plaintiff contends he was prejudiced by the judge's error.

The record shows that after the jury was selected and before opening statements, the judge was informed that one of plaintiff's attorneys had to leave because he had an emergency appointment with a doctor. The attorney asked the judge to address the jury

regarding his absence. The judge said that she would inform the jury that the attorney was not present because "a particular issue [had] come up," which counsel had "shared with the court." Plaintiff's attorneys agreed to the statement.

The judge then informed the jurors that they were very fortunate because both parties had lawyers who were "very skilled." The judge said that one of plaintiff's attorneys was not present at that time because "an issue [had] come up," which counsel shared with the court. The judge stated that the attorney had her permission not to be present.

The judge further explained that the fact that a lawyer or one of the parties may not be present on any given day "is of no consequence to the decisions that you render." The judge instructed the jurors not to consider any such absence. The judge emphasized that if an attorney or party is not present in court, it is with her permission.

Later, after the trial began, the judge was informed that plaintiff's attorney would have to have emergency surgery that day and he would not return for the remainder of the trial. Plaintiff's other attorney asked the court to provide a further instruction to the jury to explain his colleague's absence. He said he was concerned the jurors would think the absent attorney was not

interested enough in the case and may be working on some other matter.

The judge denied the application. The judge stated that she addressed this situation in her earlier instruction, when she told the jury not to consider the absence of an attorney or party in its deliberations. The judge noted that she had informed the jury that if any attorney or party was absent, it was with her permission. The judge also said she was concerned that any further comment could have the effect of "garnering sympathy from the jury." The judge stated that counsel's absence for medical reasons was not probative and could be prejudicial.

On appeal, plaintiff argues that his attorney's absence most likely created the perception that the attorney was not interested in the case. Plaintiff argues that the judge should have instructed the jury that the attorney's absence was due to a sudden and unexpected medical emergency and he could not appear for the remainder of the trial for legitimate reasons.

We are convinced, however, that the judge's refusal to provide the jury with a further instruction on counsel's absence was not an abuse of discretion. The judge's earlier instruction was sufficient to address the situation, and there was no need for any additional comment on the issue. Moreover, plaintiff's assertion

that he was prejudiced by the judge's failure to provide the instruction is not supported by the record.

IX.

Plaintiff further argues that a new trial is warranted because in summation, defendants' attorney allegedly made improper comments. In his summation, defendants' attorney stated that the jurors should use their common sense in evaluating the testimony of the witnesses. The attorney then stated:

> [Plaintiff] first has to prove that these defendants . . . did something that was below the standards of care that are expected of nurses and caused these falls to occur.
>
> Now if it was simply a case of well here we have a patient who's in a rehabilitation facility or in a long term nursing home or wherever the patient has to be and the patient fell, if it was simply the law that well we have a patient, he or she fell, the facility or the hospital is responsible. Does that make sense to you[?] Or do they first have to prove that somebody did something wrong to cause that fall.
>
> Take for example if somebody came into your home and when walking down the steps when leaving your house, they missed the last step and fell. Does that mean that you are at fault for the happening of that accident just because it happened at your house?
>
> Of course not. They'd have to prove that you did something wrong. There either was a loose brick on the bottom step that caused the fall. But maybe the person just wasn't paying attention to where they were going and missed the last step.

> Of course it wouldn't be your fault. If you got sued they'd have to prove that you did something wrong.
>
> Same thing applies here. The plaintiff has to prove that Tara Hanley did something wrong which caused these falls to happen. They have to prove that Meridian Subacute Rehab facility did something wrong to cause these falls to happen.

Plaintiff's attorney did not object until after defendants' counsel completed his closing argument and the jury had been dismissed for the day. The judge told plaintiff's attorney his objection was not timely, but if he had a specific instruction that he wanted the judge to consider, he should present it the next day. The following morning, the judge overruled the objection. The judge stated that although defendants' attorney "came close," he did not improperly invoke the "Golden Rule."

The so-called "Golden Rule" is based on the principle that "you should do unto others as you would wish them to do unto you." Geler v. Akawie, 358 N.J. Super. 437, 464 (App. Div. 2003). It is improper for an attorney to invoke the rule because it tends to encourage "the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." Id. at 464 (quoting Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1246 (7th Cir. 1982)).

Here, the record supports the judge's determination that defendants' attorney did not improperly invoke the "Golden Rule." Counsel did not ask the jurors to put themselves in the shoes of defendants, or suggest they should decide the case based on their personal interests or biases. Counsel merely presented an argument by way of analogy, and he did not distort or misrepresent the facts. The judge did not err by overruling the objection.

X.

Plaintiff argues that the judge erred by denying his motion for a new trial. Rule 4:49-1 provides:

> A new trial may be granted to all or any of the parties and as to all or part of the issues on motion made to the trial judge. On a motion for a new trial in an action tried without a jury, the trial judge may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. The trial judge shall grant the motion if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice under the law.

"[T]he appellate scope of review of an order denying a new trial is necessarily constrained." Kozma v. Starbucks Coffee Co., 412 N.J. Super. 319, 324 (App. Div. 2010). "The standard of review on appeal from decisions on motions for a new trial is the same as that governing the trial judge — whether there was a miscarriage

of justice under the law." Risko v. Thompson Muller Auto. Grp., Inc., 206 N.J. 506, 522 (2011).

On appeal, plaintiff argues that a new trial was required due to the inappropriate jury instructions and evidentiary rulings we have discussed previously. Plaintiff argues that in ruling on the motion for a new trial, the judge applied the wrong standard and conflated the issues of proximate cause with deviation from the standard of care.

Plaintiff further argues the judge did not address defendants' failure to provide evidence so that a reasonable apportionment of damages could be made under Scafidi. He contends the judge ruled incorrectly regarding the instruction on mitigation of damages.

We are convinced that these arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We conclude the judge did not err by denying the motion for a new trial.

Affirmed.