SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0964-21

JOSEPH and KAREN BREYMEIER, individually, and as parents and Natural Guardian Ad Litem of DAVID BREYMEIER,

Plaintiffs-Appellants/ Cross-Respondents,

v.

VIRTUA HEALTH, INC., d/b/a VIRTUA – WEST JERSEY HOSPITAL (VOORHEES), RYAN L. COLELLA, M.D., BERNARD J. CORTESE, M.D., ADENA B. GREENBERG, M.D., THOMAS R. KAY, M.D., JOANNE SWIFT, M.D., JANE A. IERARDI, M.D., EILEEN FOSTER, R.N., DIANE GREENER, R.N., MARIA GREEN, R.N., BARBARA HAYNES, R.N., KATHLEEN TAYLOR, R.N., DIANE WILLIAMS, R.N., ROSEMARIE MUSCI, N.P., DONNA FRANKLIN, R.N., LILLIAN LOVENDUSKI, R.N., EILEEN

MCCORD, R.N., VENICE NOCITO, R.N., JOYCE GOLDBERG, R.N., and GARDEN STATE OBSTETRICAL AND GYNECOLOGICAL ASSOCIATES,

Defendants-Respondents,

and

HOWARD OREL, M.D.,

Defendant-Respondent/
Cross-Appellant.

Argued April 26, 2023 – Decided September 12, 2023

Before Judges Accurso, Vernoia and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-0485-13.

Frank N. DiMeo, Jr., argued the cause for appellants/ cross-respondents (Rosen Schafer & DiMeo, LLP, attorneys; Frank N. DiMeo, Jr., on the briefs).

Mark A. Petraske argued the cause for respondent/ cross-appellant (Dughi, Hewit & Domalewski, attorneys; Mark A. Petraske, of counsel and on the briefs; Ryan A. Notarangelo, on the briefs).

PER CURIAM

In this medical malpractice action stemming from events occurring twenty-three years ago, plaintiffs Joseph and Karen Breymeier, individually and as parents and natural guardians ad litem of David Breymeier,[1] appeal from the denial of their motion for a new trial following a jury verdict in favor of David's pediatrician, defendant Howard Orel, M.D.[2] Plaintiffs claim the

---

[1] Because plaintiffs share a surname, we refer to them by their first names throughout, intending no disrespect.

[2] This case, which was filed in 2013 and tried in 2016, has an unusual procedural post-judgment history. Plaintiffs sued a number of persons and entities but proceeded to trial only against defendant Orel. Most of the remaining defendants either settled with plaintiffs, were voluntarily dismissed with prejudice or obtained summary judgment. Two defendants were dismissed without prejudice because plaintiffs were unable to serve them.

For reasons not clear to us, the court did not hear plaintiffs' new trial motion until early 2018, over two years after trial. Although plaintiffs filed a timely appeal from the denial of their new trial motion, we dismissed it as interlocutory in May 2018, because of the two defendants dismissed without prejudice.

Two years later, plaintiffs filed a motion to deem the judgment final as to all defendants to allow the appeal to proceed. Defendant Orel filed a cross-motion to bar further proceedings based on the statute of limitations and laches. The trial court granted plaintiffs' motion and denied defendant's, stating on the record it would stay its order to permit Joseph and Karen to apply for guardianship of David, who had by then reached majority. The trial court entered a memorializing order a few days later without noting the complaint against the unserved defendants was dismissed with prejudice and without reference to a stay or the need for a guardianship.

trial court erred in curtailing Joseph's trial testimony about what he would have done had he been advised of David's condition on his release from the hospital two days after his birth and in denying their post-trial motion because the verdict was a miscarriage of justice. Having reviewed the record, we cannot agree on either point and thus affirm the jury's verdict.

The jury heard testimony that David, Karen and Joseph's third child, was born March 21, 2000, weighing five pounds, six ounces, slightly small for his gestational age, like the oldest of the couple's children, but healthy with

---

Plaintiffs filed an amended notice of appeal in November 2020, which defendant moved to again dismiss noting David's majority and Joseph and Karen's failure to pursue a guardianship. Following inquiry from our clerk's office, Joseph and Karen filed a guardianship petition in January 2021. We subsequently granted defendant's motion to dismiss the 2020 appeal because there was still no final disposition of the claims against the unserved defendants.

Defendant thereafter made a motion in the trial court to dismiss the appeal based on the statute of limitations and laches, which the court denied in August 2021. While defendant's motion was pending, plaintiffs moved to approve the prior settlements and to enter final judgment as to all defendants. The trial court granted that motion in November 2021.

Plaintiffs timely appealed in December 2021, and defendant cross-appealed the August order denying his motion to dismiss the complaint. Given our disposition of plaintiffs' appeal, we dismiss defendant's cross-appeal as moot.

excellent Apgar scores.[3] A little less than an hour after birth, however, David was observed by hospital staff to have a blood sugar reading of twenty-nine, with forty-five being normal. Fifteen minutes later, the reading had dropped to twenty-four. A half hour after that reading, nurses fed David Similac formula, and his blood sugar rose to thirty-four. A half hour after that, his sugar level had risen to fifty-one. David's last blood sugar reading, a little more than two hours after his birth, was forty-seven.

Both parties' pediatrics and neonatology experts testified low blood sugar readings in the first couple of hours after a baby's birth are typical. Plaintiffs' expert explained "there's a period of stabilization within the first couple of hours of life where the blood sugar drops down," because it's no longer being supplied by the placenta, then "the baby releases hormones, and this happens in all babies, that bring the sugar back up."

While Karen breastfed David in the hospital at regular intervals, she testified he did not feed normally as her other children had, because he was

---

[3] "An Apgar score is an 'evaluation of a newborn infant's physical status by assigning numerical values (0-2) to each of five criteria: heart rate, respiratory effort, muscle tone, response stimulation, and skin color; a score of 8-10 indicates the best possible condition.'" C.A. ex rel. Applegrad v. Bentolila, 219 N.J. 449, 454 n. 2 (2014) (quoting Stedman's Medical Dictionary 1735 (28th ed. 2006)). David's Apgar scores were 8 at one minute after birth and 9 four minutes later.

"very tired," "very sleepy," and "wasn't a great eater." The hospital records, in contrast, reflect that David fed well throughout his hospital stay. Karen testified she did not receive a pamphlet or other information about breastfeeding, explaining "this is my third one. They basically said you're a 'pro' at this."

According to Karen, defendant visited David for the first time around 8:00 a.m. on March 23, 2000, which would have been thirty-nine hours after his birth. After initially saying she didn't remember the visit, Karen testified defendant came into her room for "[a]bout a minute-and-a-half to two minutes." In response to questions by her counsel, Karen testified defendant didn't "ever say anything about David being small, therefore you have to watch out for his care with regard to eating" and never mentioned hypoglycemia or low blood glucose levels. She testified defendant said "nothing about low blood sugar, nothing about jaundice, no instructions on anything, just to call [his office] in two weeks . . . to make the two-week appointment for David." She testified she thought she was "taking home a healthy baby" and "had no concerns."

Defendant testified he had no recollection of David or Karen. He thus based his testimony on the hospital records and his usual and customary

practice in deciding whether a newborn was ready for discharge, including a complete review of the baby's chart, the delivery notes and notes on the mother's health, a physical examination of the baby, review of all nursing notes, a conversation with the nurse on duty and a discussion with the baby's mother, during which he would provide discharge instructions. Defendant testified that, according to David's chart, defendant spent fifty minutes performing those tasks before signing the discharge order for David.

Defendant testified he was sure he had not discussed with Karen the drop in David's blood sugar levels in the hours after his birth as defendant didn't consider the findings abnormal or any cause for concern given the consistent reports that David was feeding well, producing wet diapers and having bowel movements in the day-and-a-half since those readings. Defendant testified the most important point of his discussion with the mothers of new babies about to be discharged, and a point he would have made with Karen, was the importance of ensuring the baby was feeding well. Because there's no way to measure how much milk a breastfed baby receives at each feeding, defendant explained it was "always [his] custom to say that I would expect babies to wet at least four diapers in twenty-four hours and that's something [he] want[ed] to hear" from a new mother.

Defendant claimed he would have solicited Karen's opinion as to how David was feeding as compared with her other children, explaining that David should eat "roughly" no more than every hour-and-a-half so as to not tire him, and no less than every four "but in no case more than five hours." He testified David had established a pattern of feeding well in the hospital, but he would have stressed to Karen that she should call his office right away if there was any change to that pattern when David went home.

Defendant also noted Karen received further discharge instructions from a nurse, who noted in the chart the instructions she provided Karen about "feeding pattern," signs and symptoms of dehydration, and that she should call the "pediatric doctor with any concerns or questions," all of which Karen "verbalized understanding." Defendant testified there was no reason to have ordered a blood glucose test before discharging David given his history in the hospital, and that he "discharged home a perfectly healthy baby who was slightly small for his age."

Karen testified she and Joseph arrived home with David about 2:00 p.m. on the day of his discharge, a little less than forty-eight hours after he was born. According to Karen, she breastfed David at 4:00 p.m., and that he "fed okay," but he was tired. She testified he generally fed "about the same" as her

other two children but seemed "more tired." When she next fed him at 8:00 p.m., he was again tired and did not feed as well as before. Karen testified she fed David again at midnight and at 4:00 a.m., noting he was "tossing" and "very antsy." She acknowledged he appeared "fidgety" but didn't realize that could be related to low blood sugar.

Joseph went to work the next morning, but at 8:30 a.m., Karen thought David "didn't look well" because his skin was a "grayish, greenish color." With the assistance of her sister, Karen took David to defendant's office where they saw one of defendant's colleagues, Howard Waxman. Dr. Waxman testified Karen told the nurse, who noted it on David's chart, that David hadn't eaten since 4:00 p.m. the day before. Karen reported David had weighed five pounds, one ounce when he was discharged at 1:00 p.m. the day before. David's office chart noted David weighed 4 pounds 12.3 ounces in the office.

Dr. Waxman testified his own note of his conversation with Karen, which he would have written while speaking to her, states that David had refused to eat since 4:00 p.m. the previous day, eighteen hours before, and prior to that the baby had been breastfeeding every four hours. He testified that after examining David, he concluded David was "not demonstrating an ability to keep [himself] hydrated, was very lethargic, was having poor

feeding." He told Karen to take David to the neonatal intensive care [NIC] unit at the hospital, five minutes away, so doctors there could run tests and give David IV fluids.

Karen denied telling Dr. Waxman or his office nurse that David hadn't eaten in the last eighteen hours. She testified David "was feeding." He was "latching on, eating as he was in the hospital, but not as much." She "guessed when [she] called the pediatrician, to let them know that I was home for eighteen hours now, maybe she misinterpreted that as eighteen hours not feeding." Karen's sister testified that Karen told Dr. Waxman that David was "feeding well, just not as well as a normal baby would."

Karen testified she took David directly to the NIC unit at the hospital. The neonatologist who treated David on his readmission, Jane Ierardi, testified David had a seizure shortly after admission while a nurse was trying to establish an IV line, and his glucose level was twenty. She testified her note from that day stated, "Mom reports he fed poorly at home and refused all breastfeeding attempts for the 18 hours prior to admission." Dr. Ierardi confirmed her assessment from that date — that David was "a three-day-old term, small for gestational age male with hypoglycemia [and] dehydration,"

which was "likely secondary" to "[l]ack of receiving any nutrition or fluids by mouth."

David's treating neurologist, David Clancy, testified that David's neonatal hypoglycemia caused an acute brain injury three days after his birth, resulting in chronic static encephalopathy, which in David's case includes serious cognitive deficits, visual impairment and a seizure disorder, "significantly impair[ing] his ability to ever live independently." Dr. Clancy conceded, however, on cross-examination that David demonstrated no signs of hypoglycemia before he was discharged from the hospital two days after he was born.

Plaintiffs' expert in pediatrics and neonatology, Robert Herzlinger, testified stopping glucose testing two-and-a-half hours after David was born did not comply with the standard of care. He testified standard medical care for small-for-dates babies was to continue glucose screening for forty-eight hours.[4] He explained the risk for hypoglycemia remains during that period, because "it's still possible that the sugar can continue to drop if the baby's not

[4] Dr. Herzlinger agreed with plaintiffs' counsel that David was "only slightly small for dates." David weighed five pounds, six ounces at birth, two ounces below the five pounds, eight ounces considered to fall within the average weight range for newborns.

receiving adequate feedings." According to Dr. Herzlinger, the risk was greater for breastfed babies because of the delay in the mother's milk "coming in."

Dr. Herzlinger testified that defendant's deviation from the standard of care in failing to conduct additional glucose testing before discharge was a significant and substantial factor in causing David's neurological injury. Indeed, he testified the failure to do additional glucose testing was "the major issue" in David's case. In his opinion, David had asymptomatic hypoglycemia when he was discharged by defendant, which "produced the poor feeding," which "got progressively worse because of his decreased intake until he developed severe symptoms of hypoglycemia, which is seizures." Dr. Herzlinger was forced to concede on cross-examination, however, like Dr. Clancy was, that he didn't know what David's glucose reading was on discharge, and that David did not exhibit any signs of hypoglycemia before defendant discharged him.

Dr. Herzlinger testified that defendant also deviated from the standard of care because the family should have been "cautioned about feeding and the importance of feeding in order to maintain [David's] blood sugar." According to Dr. Herzlinger, "there was a risk factor for hypoglycemia in that [David]

was small-for-dates and he was being breastfed" and thus defendant should have instructed the family that if there were any problems with feeding, or any other symptoms of hypoglycemia, that they should notify the office immediately. He testified defendant's failure to provide those instructions to the family was a "substantial factor" resulting in David's hypoglycemia. Dr. Herzlinger agreed with defendant's counsel on cross-examination that if Karen was told "that if the feeding pattern changes, you call the pediatrician," the instructions would "be appropriate and within the standard of care."

John Lorenz testified for the defense as an expert in pediatrics and neonatology. Dr. Lorenz concluded defendant met the standard of care in connection with his care and treatment of David. He testified the standard of care did not require defendant to obtain additional blood glucose testing before discharge because David "had been well and feeding and asymptomatic," that is, he'd had no symptoms of illness of any kind, including hypoglycemia. He testified that at the time defendant saw David, at approximately forty hours of age and having no symptoms, "there would be no indication to [] check his glucose."

Dr. Lorenz testified defendant appropriately discharged David because "he had been feeding normally and showing no signs of any problems." He

further testified defendant's conversation with Karen, in which he advised her to call if there were any changes in David's feeding, any decrease in the number of wet diapers, or any unusual behaviors, was consistent with the standard of care.

Dr. Lorenz concurred with defendant that symptomatic hypoglycemia did not exist at the time of David's discharge. He testified to his opinion that David developed symptomatic hypoglycemia "during the time frame when he did not feed well for a period of 18 hours," a development not predictable by a reasonable pediatrician functioning within the standard of care based on David's entirely normal hospital course.

The jury, by a vote of seven to one, found defendant was negligent and that he deviated from the standard of care. The jury also found, however, by the same vote count, that plaintiffs did not prove defendant's negligence increased the risk of harm to David from his pre-existing condition.

Plaintiffs made two related arguments on their new trial motion: that the court erred in curtailing Joseph's testimony as to what he would have done if he'd been advised of David's low blood sugar readings on discharge, and that the verdict constituted a miscarriage of justice because the jury's finding that

defendant was negligent is inconsistent with its finding that defendant's negligence didn't increase the risk of harm to David.

Specifically, plaintiffs contended the only way to make sense of the jury's verdict was to assume it concluded Joseph and Karen's failure to act sooner was the proximate cause of David's injuries, and thus defendant's negligence wouldn't have made a difference to the outcome. They argued, however, that had defendant advised them of David's low blood sugar and increased risk of symptomatic hypoglycemia, they would have acted sooner. Thus, curtailing Joseph's testimony as to what he would have done had defendant not breached his standard of care led the jury to a result — that plaintiffs' failure to act caused the harm — it otherwise would not have reached.

Defendant countered that plaintiffs' expert testified unequivocally that the standard of care only required defendant to advise Karen that should David's feeding pattern change, she should call the pediatrician. He thus argued that Joseph's testimony as to what he would have done had he been told of David's low blood sugar readings and risk of hypoglycemia was irrelevant because the standard of care, according to their own expert, didn't require it.

Defendant posited the jury could have found defendant's instructions consistent with the standard of care, and that he was negligent in not ordering additional glucose testing before David's discharge, but that failure didn't contribute to David's injuries, making for a "consistent" verdict. In other words, the jury could have accepted defendant and his expert's view that there was no pre-existing condition on discharge, and that David only developed hypoglycemia overnight from his failure to feed, and thus defendant's failure to order glucose testing "did not increase the risk of harm of a pre-existing condition."

After hearing argument, the judge denied plaintiffs' motion. The judge rejected plaintiffs' argument that prohibiting Joseph from testifying to what he would have done affected the verdict because it "wasn't an issue" in light of plaintiffs' expert's testimony that defendant's instructions, if they were given, were consistent with the standard of care. The judge found there was "enough evidence for [the jury] to conclude that [defendant's discharge] instructions were appropriate," but given the dispute over glucose testing, that he shouldn't have discharged David without another test, breaching the standard of care.

But assuming the jury found defendant negligent on both the instructions and the test, the judge noted it was plaintiffs' burden to establish defendant's

negligence was a substantial factor increasing the risk of harm to David. The court concluded the evidence was "not clear" on that point, and the jury could certainly have concluded "there was no preexisting condition, . . . no hypoglycemia" when David was discharged and thus no increased risk of harm. Although the court stated it "wasn't too sure" it would have agreed, and that it "would have probably come to a different conclusion," that was not the test under Rule 4:49-1(a). Finding the evidence sufficient to support the verdict, the court found plaintiffs did not carry their burden to establish a miscarriage of justice under the law. Plaintiffs appeal, reprising their arguments to the trial court.

We review a motion for a new trial using the same standard as the trial court. Township of Manalapan v. Gentile, 242 N.J. 295, 304 (2020). Thus, "we consider whether denying a new trial 'would result in a miscarriage of justice shocking to the conscience of the court.'" Liberty Ins. Corp. v. Techdan, LLC, 253 N.J. 87, 103 (2023) (quoting Township of Manalapan, 242 N.J. at 305). We review the trial court's evidentiary rulings for abuse of discretion, reversing "only in the case of a 'clear error in judgment.'" State v. Medina, 242 N.J. 397, 412 (2020) (quoting State v. Scott, 229 N.J. 469, 479 (2017)).

We find no merit in plaintiffs' contention that the court erred in precluding Joseph from testifying as to what he would have done had he been advised of David's low sugar reading in the hospital and his increased risk for hypoglycemia. Besides being speculative, and thus arguably barred by N.J.R.E. 701, a review of the record makes plain that both Joseph and Karen testified as to what they would have done had they been better informed.

Joseph was testifying as a rebuttal witness when his counsel posed this question:

> You heard . . . testimony I believe from Dr. Lorenz about if parents view any problem [with low blood sugar], they will call the pediatrician and the father can go get formula. Now if you had been aware of any problem such as Dr. Lorenz referenced, what would you have done?

Joseph replied:

> If I knew that there was a problem, I would have taken him right to the hospital.

Similarly, on redirect, plaintiffs' counsel asked Karen what she would have done differently after discharge had she known David was hypoglycemic. The court permitted the question over defense counsel's objection, leading to Karen's lengthy response:

> If I knew that my son was in any danger with low blood sugar or jaundice, I would have asked questions.

> I would have asked questions. I wouldn't have allowed them to let me go.
>
> I didn't know that he had any kind of problems when I left that hospital. I didn't know that he had low blood sugar, that he was treated for anything. I didn't know that he was jaundiced, even though he looked quite jaundiced to me.
>
> And I had a little conversation about that with a roommate when I went to leave there. And it was just a funny thing that their baby was pure white and red hair and the parents were, and they said my baby had a tan, it was in the back of my mind, but I did not — the nurse that was wheeling me out, she just chuckled, and I said, well, they would have told me, they would have gave me instructions when I'm leaving this hospital and telling me, oh, you're baby's jaundiced, let me give you some instructions on that, your baby had low glucose, low blood sugar during his stay.
>
> I would have reacted. I wouldn't have went home and said, okay, well, this baby is a normal baby, but, you know — but I didn't know the effects — the effects of that. No one told me that he had low blood sugar and he was being treated. They didn't tell me that he had — that he was jaundiced in the hospital. I had no idea of these things. No idea.

As both Joseph and Karen were plainly permitted to tell the jury what they would have done had they been advised that David had low blood sugar readings and was at risk for hypoglycemia, we reject their contention that the absence of such testimony created a "vacuum," depriving the jury of sufficient

testimony "to decide if defendant pediatrician's deviation from the standard of care increased the risk of harm to plaintiffs' son."

As for the alleged inconsistency in the verdict, our review of the record convinces us the trial court was correct in finding no miscarriage of justice. Plaintiffs proceeded on a Scafidi theory, that is that David was suffering from a pre-existing condition, asymptomatic hypoglycemia, requiring them to prove that defendant deviated from the standard of care; his deviation increased the risk of harm to David; and the increased risk "was a substantial factor in producing the ultimate result." Scafidi v. Seiler, 119 N.J. 93, 108 (1990). As the trial judge correctly noted, it was plaintiffs' burden to establish David suffered from the pre-existing condition. See Anderson v. Picciotti, 144 N.J. 195, 209 (1996) (noting "the party requesting the Scafidi charge has the burden of persuading the trial court and the jury based on the proofs presented that the evidence is sufficient to sustain such a charge").

Our review of this extensive record convinces us the trial court was correct in finding the jury could have reasonably concluded based on Dr. Herzlinger's testimony that defendant was negligent in failing to order additional glucose testing, but that such testing would not have reduced David's risk of harm in light of Dr. Lorenz's testimony that David's

hypoglycemia did not arise until after discharge, when he fed poorly or not at all overnight. The jury could also have reasonably credited Dr. Lorenz's testimony that defendant's discharge instructions were consistent with the standard of care. Thus, we reject plaintiffs' claim that the verdict was hopelessly inconsistent, resulting in a miscarriage of justice.

Affirmed.