SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1250-16T2

THOMAS PICILLO,

Plaintiff-Appellant/
Cross-Respondent,

v.

WEST MORRIS PEDIATRICS, PA, KAREN PATASHNY, MD, SUSHEELA THOMAS, MD, ADVOCARE, LLC, CHILDREN'S HEALTH ASSOCIATES, LLC, ADVOCARE WEST MORRIS PEDIATRICS, LLC,

Defendants-Respondents/
Cross-Appellants,

and

BARBARA STRAND, MD, CHARLES BUSHONG, MD, CONNIE PACZKOWSKI, MAUREEN TORCHIA, EILEEN CORCORAN, MICHAEL PETERS, MD, and HEIDI DAVIS,

Defendants.

Argued May 1, 2018 – Decided May 17, 2018

Before Judges Hoffman, Gilson and Mitterhoff.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1044-10.

Neil S. Weiner argued the cause for appellant/cross-respondent (Lynch Lynch Held & Rosenberg, PC, attorneys; Neil S. Weiner, on the briefs).

Sean P. Buckley argued the cause for respondents/cross-appellants (Buckley Theroux Kline & Petraske, LLC, attorneys; Teresa C. Finnegan, on the brief).

PER CURIAM

In this medical malpractice action, plaintiff Thomas Picillo appeals from a June 10, 2016 judgment memorializing a jury verdict of no cause of action, and an October 28, 2016 order denying plaintiff's motion for a new trial. Defendants cross-appeal from an in limine order barring them from introducing evidence concerning plaintiff's mother's employment as a school nurse, and her involvement in plaintiff's care. For the reasons that follow, we affirm.

I

We discern the following facts from the record. In 1992, plaintiff came under defendants' care at eighteen months of age. By the time plaintiff was eight years old, he suffered from

increasing episodes of acute otitis media (AOM)[1] and serous otitis media (SOM).[2] Between 1998 and 2001, plaintiff visited defendants on numerous occasions for ear related complaints.

In May 1999, plaintiff failed his school hearing test. Defendants found SOM, but neither referred plaintiff to an otolaryngologist (ENT), nor re-tested his hearing. In October 2000, after plaintiff again failed his school hearing test, defendants found an ear infection; however, again, they neither referred plaintiff to an ENT nor re-tested his hearing.

In March 2005, plaintiff's right ear began bleeding. His father brought him to Dr. Damian Sorvino, an ENT. On Dr. Sorvino's first examination, he observed "a questionable white type of structure behind the eardrum on the right side," which he suspected was "a possible cholesteatoma."[3] A CAT scan confirmed the presence

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[1] Defendants' expert pediatrician, Dr. Harold Raucher, explained, "[O]titis media is a general term for anything that causes an inflammation in the middle ear cavity . . . . [And] 'acute' implies . . . new onset, so this is a brand-new condition. And it's basically an ear infection, a middle ear infection that's new."

[2] SOM is a collection of non-infected fluid in the middle ear space. If the fluid persists, it can cause temporary decrease in hearing and may become infected . . . ." Otitis Media with Effusion (OME), Children's Hosp. of Phila., (Apr. 2009) http://www.chop.edu/healthinfo/otitis-media-with-effusion.html.

[3] Dr. Sorvino testified, "A cholesteatoma is a cyst-like structure of skin cells in the wrong location. Cholesteatomas can occur

of "a large cholesteatoma in the middle ear, which is the area behind the eardrum." Plaintiff then underwent several surgeries, including a tympanomastoidectomy, which Dr. Sorvino explained is "a surgery going into the middle ear and the mastoid for removing the cholesteatoma."

In August 2013, plaintiff filed suit against defendants; in his complaint, he alleged he developed the cholesteatoma due to defendants' negligent treatment. At trial, plaintiff contended that had defendants timely referred him to an ENT, the ENT would have inserted tympanostomy tubes (t-tubes), which would have prevented the cholesteatoma's growth. Plaintiff further alleged defendants' negligence caused him to undergo numerous surgeries and left him with a permanent hearing impairment.

This case became a battle of experts, with both sides presenting testimony from multiple medical doctors. According to Dr. Louis Rondinella, plaintiff's ENT expert, had defendants referred plaintiff to an ENT in 2001, plaintiff likely would have had a better outcome. In his trial testimony, he explained,

> [W]e know that cholesteatomas grow slowly over time and if the cholesteatoma was present in 2001, we know it's going to be smaller than

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congenitally where there are skin cells caught behind the eardrum, and cholesteatomas can be acquired where there is almost like a vacuum pressure of the eardrum . . . causing a problem and it can cause a cyst-like growth . . . where the outside skin cells are pulled inside . . . ."

> it was in 2005, giving a higher chance of a situation where the cholesteatoma could have been completely resected . . . without affecting the hearing.
>
> . . . .
>
> If there was no cholesteatoma in 2001 and tubes were put in, there's a good chance it could have prevented the formation of a retraction pocket . . . and . . . a retraction pocket is a setup for a cholesteatoma. So, if the tubes were put in, in 2001 without a cholesteatoma, there's . . . a much higher chance that the whole sequence of events leading to a cholesteatoma never would've happened.

Although Dr. Rondinella stated "it's possible" plaintiff's cholesteatoma was present in 2001, he acknowledged he could not "say for certain it was"; when plaintiff's counsel asked him if he had an opinion "as to when this cholesteatoma actually developed," he responded, "Some time between 2005 and 1999." Prompted to provide a more exact date, the doctor replied, "I'd have to say in the middle, around 2003."

On cross-examination, however, Dr. Rondinella acknowledged testifying at deposition that the cholesteatoma originated in 1999. He attributed the discrepancy to his misunderstanding of the term "reasonable degree of medical probability." He further conceded that even children who have had t-tubes inserted continue to develop cholesteatomas "fairly frequent[ly]."

Defendants' ENT expert, Dr. Lee Rowe, testified that plaintiff's cholesteatoma started to develop in 2003. He opined that the cholesteatoma developed in "the attic, which is the area above the middle space in the human ear." Dr. Rowe explained that because the cholesteatoma was not seen before 2005, it therefore must have originated in the attic.

Dr. Harold Raucher, defendants' pediatric expert, provided a similar opinion regarding the location of the cholesteatoma. He explained "the attic[,] or the epitympanum, . . . is . . . part of the middle ear that you cannot visualize when you look in an ear with an otoscope." Although ENTs typically treat cholesteatomas, Dr. Raucher stated his own medical education and training was sufficient for him to offer opinions on the condition, because "a pediatrician needs to know about how to spot a cholesteatoma" to understand when an ENT referral is necessary.

On cross-examination, Dr. Raucher acknowledged he had only seen two cholesteatomas in his lifetime — one while a medical student and one around 1980, during his residency. Dr. Raucher also conceded he "never actually diagnosed" a cholesteatoma.

Over objection, Dr. Raucher testified that plaintiff's cholesteatoma originated in "the attic" of plaintiff's ear cavity, reasoning:

> [M]any nurse practitioners, many physicians at [defendants' office], the school doctor, everyone is looking at these ears, and they don't see anything. . . . There's no mass seen on multiple visualizations, for years. There's normal hearing at sixth grade and eighth grade. On the other hand, in . . . the middle of 2005[,] there's a big mass seen. It's absolutely consistent with this that the mass was growing in the attic, in a place where nobody could see it, and didn't come down into the mesotypanum until after [plaintiff's] last checkup in 2004, and that's the reason why no one could see it.

Ultimately, the jury found defendants deviated from the applicable standard of care, and the deviation increased the risk of harm to plaintiff; however, the jury found defendants' substandard care did not constitute a substantial factor in causing plaintiff's injuries. On June 10, 2016, the trial judge entered a judgment of no cause memorializing the jury's verdict.

Plaintiff moved for a new trial on the issue of substantial factor and damages. Following oral argument, the trial court denied the motion. This appeal followed.

On appeal, plaintiff challenges the trial judge's decision to permit Dr. Raucher, defendants' pediatric expert, to testify that plaintiff's cholesteatoma originated in the attic of his ear — an issue that went to the heart of proximate cause. Plaintiff asserts only an ENT could properly provide such testimony, arguing the subject matter lies beyond the purview of a pediatrician.

Additionally, plaintiff asserts the trial judge improperly charged the jury. He argues his contention at trial was that the cholesteatoma formed in 2003, yet, the trial judge charged the jury that it was plaintiff's contention the cholesteatoma began developing "in 1999 or 2003."

II

We initially address plaintiff's claim that the trial judge erred in allowing defendants' pediatric expert to opine on the cholesteatoma's origination. We are guided by the well-settled principle that "rules of appellate review require substantial deference to a trial court's evidentiary rulings." Benevenga v. Digregorio, 325 N.J. Super. 27, 32 (1999) (quoting State v. Morton, 155 N.J. 383, 453 (1998)). We limit our review "to examining the decision for an abuse of discretion." Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008) (citation omitted); see also Estate of Hanges v. Met. Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010). A trial court can be said to have abused its discretion when "its finding was so wide of the mark that a manifest denial of justice resulted." State v. Carter, 91 N.J. 86, 106 (1982) (citation omitted).

Applying these principles, we do not find the judge abused his discretion in permitting Dr. Raucher's testimony regarding the cholesteatoma's place of origin. In malpractice actions, a

"witness is competent to testify as an expert . . . [if he or she] has sufficient knowledge of professional standards applicable to the situation under investigation to justify his [or her] expression of an opinion relative thereto." Sanzari v. Rosenfeld, 34 N.J. 128, 136 (1961) (citation omitted). When there is an overlap between practices of disciplines, a licensed medical practitioner who is familiar with the situation in dispute may "possess the requisite training and knowledge to express an opinion as an expert." Rosenberg v. Cahill, 99 N.J. 318, 332 (1985).

As the trial judge recognized, Dr. Raucher is a qualified pediatrician, and his practice requires him to recognize various ailments — including cholesteatomas — in order to refer patients to specialists. Further, Dr. Raucher testified about his extensive experience in examining ears, and plaintiff had the opportunity on cross-examination to expose the doctor's limited experience in observing or treating cholesteatomas. Accordingly, the trial judge did not abuse his discretion in allowing Dr. Raucher's testimony.

III

We next address plaintiff's allegation that the trial judge committed reversible error in instructing the jury that it was plaintiff's contention his cholesteatoma developed in 1999 or 2003. We disagree.

"It is fundamental that '[a]ppropriate and proper charges to a jury are essential for a fair trial.'" Velazquez v. Portadin, 163 N.J. 677, 688 (2000) (alteration in original) (quoting State v. Green, 86 N.J. 281, 287 (1981)). Courts should tailor the jury charge to the specific facts of the case. See Reynolds v. Gonzalez, 172 N.J. 266, 291 (2002).

"A jury instruction that has no basis in the evidence is unsupportable, as it tends to mislead the jury." Prioleau v. Kentucky Fried Chicken, 223 N.J. 245, 257 (2015) (quoting Dynasty, Inc. v. Princeton Ins. Co., 165 N.J. 1, 13-14 (2000)). Nonetheless, this court "will not reverse if an erroneous jury instruction was 'incapable of producing an unjust result or prejudicing substantial rights.'" Ibid. (quoting Mandal v. Port Auth. of N.Y. & N.J., 430 N.J. Super. 287, 296 (App. Div. 2013)).

Here, plaintiff takes issue with the following portion of the judge's charge addressing plaintiff's contentions:

> Plaintiff alleges that he lost the chance of a better outcome because of a departure from the accepted standards of medical care by one or both defendants. Plaintiff contends that eustachian tube dysfunction led to recurrent otitis media, persistent and recurrent serous otitis media, persistent hearing loss, and ultimately[,] development of a cholesteatoma in his right ear in 1999 or 2003.

Specifically, plaintiff argues that by referencing the specific dates of "1999 or 2003," the trial judge "forced a theory upon

[p]laintiff that [p]laintiff did not espouse." We are not persuaded.

The record reflects plaintiff's expert, Dr. Rondinella, testified at trial that plaintiff's cholesteatoma began developing at some point between 1999 and 2005. When asked to provide a more exact date, he stated "around 2003." Then, on cross-examination, the jury heard that Dr. Rondinella previously testified at his deposition that the cholesteatoma originated in 1999. Because the judge's charge accurately reflected the opinions expressed by plaintiff's expert at trial and at his deposition, we reject plaintiff's claim of harmful error.

From our review, the judge's charge including the dates identified by plaintiff's expert was not "false and very harmful," as plaintiff argues. See Reynolds, 172 N.J. at 290 (holding a trial judge has a duty to review testimony, and comment upon it during the jury charge). Although model jury charges are helpful to trial courts, "the better practice in complex cases is to discuss the law in the context of the material facts of the case, reviewing the evidence, where appropriate." Id. at 291.

Accordingly, the record lacks a basis for us to order a new trial. We therefore dismiss defendants' protective cross-appeal as moot. See Deutsche Bank Nat'l Trust Co. v. Mitchell, 422 N.J. Super. 214, 221-22 (App. Div. 2011) (quoting Greenfield v. N.J.

Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006)) ("[A]n issue is moot when our 'decision sought in a matter, when rendered, can have no practical effect on the existing controversy.'").

Affirmed.