

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: March 27, 2013)

ANTONIO RIBEIRO

v.

THE RHODE ISLAND EYE INSTITUTE,
LLC and MARTIN P. NEWMAN, O.D.

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C.A. No. PC-07-4069

DECISION

CLIFTON, J. Before the Court are various post-trial motions in this medical negligence case. The case was tried before a jury in November 2011, and the jury returned a verdict that Defendant Martin P. Newman, O.D. had breached the standard of care but that breach was not the cause of Plaintiff Antonio Ribeiro’s injuries. Mr. Ribeiro, Dr. Newman, and Defendant Rhode Island Eye Institute, LLC all filed post-trial motions: Mr. Ribeiro moved for a new trial; Dr. Newman and the Rhode Island Eye Institute, LLC each renewed their motions for judgment as a matter of law or alternatively moved for a new trial. Jurisdiction is pursuant to Rules 50 and 59 of the Superior Court Rules of Civil Procedure.

I

Facts and Travel

On August 24, 2004, Mr. Ribeiro, who had developed blurred vision in his right eye, saw Dr. Newman at the Rhode Island Eye Institute, LLC. Dr. Newman, an optometrist, examined Mr. Ribeiro, conducted various tests including a slit-lamp exam and an Amsler test,¹ and

¹ According to Dr. Newman’s testimony, a slit-lamp exam is an exam that allows a doctor to examine the portion of the eye from the iris forward through the cornea, and an Amsler test requires a patient to focus on a point and describe any distortion in the grid pattern that surrounds that point.

concluded that Mr. Ribeiro had central serous retinopathy (CSR), a buildup of fluid behind the retina of the eye, and ordered an ocular coherence tomography (OCT) exam, which includes multiple, cross-sectional scans of the eye, to confirm this diagnosis. Dr. Newman told Mr. Ribeiro that his condition should resolve itself and scheduled a follow-up appointment. When Dr. Newman reviewed the results of the OCT scans, he determined that they verified his CSR diagnosis; because they did not change his diagnosis or recommended treatment, Dr. Newman did not notify Mr. Ribeiro of the results.

Mr. Ribeiro returned to the Rhode Island Eye Institute, LLC and Dr. Newman on October 25, 2004. Dr. Newman again concluded that Mr. Ribeiro had CSR, again performed an OCT test, and one week later referred Mr. Ribeiro to Dr. Timothy You, a retinal specialist at the Rhode Island Eye Institute, LLC. On November 1, 2004, Dr. You examined Mr. Ribeiro and diagnosed him with a retinal detachment in his right eye, which required surgery. The surgery was performed on November 4, 2004, but Mr. Ribeiro's vision was not restored to its former acuity.

Mr. Ribeiro filed suit in August of 2007, alleging that Dr. Newman was negligent in his August 2004 failure to diagnose Mr. Ribeiro with a retinal detachment. After trial, the jury determined that Dr. Newman breached the standard of care of an optometrist but that that breach was not the cause of Mr. Ribeiro's injuries. Judgment entered consistent with that verdict. As the motions before the Court largely hinge on different aspects of the trial, additional facts will be included where necessary.

II

A

Plaintiff's Motion for a New Trial

Mr. Ribeiro argues that the Court erred when it precluded Dr. Susan Bressler from testifying about the October 2004 OCT scans and the notations and diagrams that Dr. You made upon Plaintiff's referral to him by Dr. Newman.

Prior to trial, the parties made various motions that limited the scope of the issues for trial and which witnesses would testify about those issues. The alleged negligence was limited to Mr. Ribeiro's August 24, 2004 visit to Dr. Newman. To support that theory, Mr. Ribeiro intended to call as expert witnesses Dr. David Greenstein and Dr. Susan Beth Bressler. Plaintiff did not advance a theory that Dr. Newman was negligent during the October 25, 2004 visit. Dr. Greenstein, an optometrist, was offered as an expert on an optometrist's standard of care and whether Dr. Newman met that standard. After a pretrial motion by Defendants, Dr. Greenstein was prohibited from testifying about time frame within which treatment would have restored Mr. Ribeiro's eyesight. Dr. Bressler, an ophthalmologist, would testify about causation and damages. The extent of Dr. Bressler's testimony was likewise the subject of a motion in limine by Defendants.

Upon Defendants' November 1, 2004 motion in limine to preclude Dr. Bressler from testifying as an expert on the standard of care of an optometrist, Plaintiff said that he did not intend to call her for that purpose. Additionally, Defendants moved to preclude Dr. Bressler from testifying about her interpretation of the OCT scans because such testimony could confuse the jury, which might conclude that she was saying that Dr. Newman violated the standard of care of an optometrist. Plaintiff argued that Dr. Bressler would testify that the August 2004 OCT

scans show a detached retina and that the October 2004 OCT scans demonstrate that the condition had worsened and could no longer be repaired. Because Plaintiff represented that Dr. Bressler was not being called as an expert on the standard of care and because the parties could properly limit Dr. Bressler to the appropriate subject matter—Plaintiff by framing questions and Defendants by objecting—the Court determined that it was unnecessary to rule on the motion at that time, explaining that Defendants were free to object to any questions that they believed would illicit standard-of-care testimony.

Thereafter, Dr. Newman, again concerned that the jury may confuse Dr. Bressler’s testimony for standard-of-care testimony, moved to limit that testimony regarding the OCT tests to hypotheticals. After initially ruling that questions regarding the October 2004 OCT scans must be in hypothetical form, the Court said that it would “modify or change its earlier ruling” and would allow Plaintiff “to question Dr. Bressler concerning both the August and October OCT results” but only after instructing the jury that Dr. Bressler was being offered for a limited purpose—causation. In Plaintiff’s view, testimony regarding the OCT result was necessary to prove that the retinal detachment that Mr. Ribeiro alleged was present in August had worsened and was not CSR.²

Argument continued about the extent to which the Court would permit Dr. Bressler to testify about anything that happened after Dr. Newman’s August diagnosis. The Court considered whether Dr. Bressler would be able to testify about the “chronicity” of Mr. Ribeiro’s condition, that is, how long his retina had been detached and whether it was an acute or chronic

² According to the testimony, CSR can progress into a retinal detachment, but a retinal detachment cannot become CSR.

condition.³ Although Dr. You would not be testifying and the Court had instructed the jury that Dr. You had not diagnosed Mr. Ribeiro with a chronic retinal detachment, Plaintiff planned to question Dr. Bressler about her conclusions about a diagram made by Dr. You on November 1, 2004, when he examined Mr. Ribeiro. Dr. Bressler's opinion was that Dr. You's diagram demonstrated that the retinal detachment had been present for some time. There had been some suggestion that Mr. Ribeiro's condition was CSR on August 24, 2004, the date of the alleged negligence, and had worsened to a retinal detachment some time later, which Plaintiff hoped to dispel with testimony about the duration of Mr. Ribeiro's retinal detachment. The Court ruled that, depending on the cross-examination of Dr. Bressler regarding the duration of Mr. Ribeiro's condition, Plaintiff would be able to engage in redirect examination on the length of time Mr. Ribeiro's retina had been detached.⁴

During the direct examination of Dr. Bressler, the Court sustained Defendants' objections to questions posited to Dr. Bressler about the October OCT scans and Dr. You's examination. The Court said at sidebar that if the Defendants directly or inferentially touched upon how long Mr. Ribeiro's condition existed, then Plaintiff can question Dr. Bressler about the duration of the retinal detachment that she testified had existed in August 2004. The Court made a similar ruling on the objection to testimony about Dr. You's diagram from November 2004: the witness was a causation witness who testified that Mr. Ribeiro had an uncorrectable retinal detachment on August 24, 2004, and she would not be permitted to testify about events after that date unless Defendants raised the issue of the duration of Mr. Ribeiro's condition.

³ "Acute" is defined as "[r]eferring to a health effect, usually of rapid onset, brief, not prolonged." Stedman's Medical Dictionary 22 (27th ed. 2000). "Chronic" is defined as "[r]eferring to a health-related state, lasting a long time." *Id.* at 348. "Chronicity" is defined as "[t]he state of being chronic." *Id.*

⁴ The Court stated that this ruling was not limited to the word "chronicity."

Plaintiff argues that the Court committed prejudicial error by precluding Dr. Bressler from testifying about the October OCT exam and Dr. You's diagram, which Plaintiff argues were necessary to demonstrate that his condition was uncorrectable after Dr. Newman failed to diagnose a retinal detachment in August. Defendants argue that the Court did not err and that, if the Court did err, the error was harmless.

B

Standard of Review

Rule 59 of the Superior Court Rules of Civil Procedure provides that “[a] new trial may be granted to all or any of the parties and on all or part of the issues for error of law occurring at the trial or for any of the reasons for which new trials have heretofore been granted in the courts of this state.” According to the Rhode Island Supreme Court, “any error of law, if prejudicial, is a good ground for a new trial.” Votolato v. Merandi, 747 A.2d 455, 460 (R.I. 2000) (quoting 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2805 at 55 (1995)). A trial court “by definition abuses its discretion when it makes an error of law.” Id. (citing Koon v. United States, 518 U.S. 81, 100 (1996)). The rule allowing for a motion for a new trial based on an error of law “authorize[s] . . . a ‘Win this one for the Gipper’ type of argument, in which counsel seeks to convince the trial justice of the soundness of a legal argument that counsel previously had made at a pre-verdict state of the trial.” Tyre v. Swain, 946 A.2d 1189, 1202 (R.I. 2008) (citing John Bartlett, Familiar Quotations: A Collection of Passages, Phrases and Proverbs Traced to their Sources in Ancient and Modern Literature 674 (16th ed. 1992) (attributing “Win this one for the Gipper” to legendary coach Knute Rockne’s

inspirational reference to Notre Dame's first All-American football player, George Gipp)).⁵ As Votolato and Rule 61 make clear, however, an error of law must be prejudicial to warrant a new trial. See Super. R. Civ. P. 61; 747 A.2d at 460.

C

Analysis

In a medical negligence case alleging the negligent failure to properly diagnose a condition, “causation is frequently difficult to ascertain and prove.” Schenck v. Roger Williams Gen. Hosp., 119 R.I. 510, 517, 382 A.2d 514, 518 (1977). The plaintiff in such a case ““must produce testimony from which the jury might infer that proper diagnosis and treatment with reasonable probability would have aided the patient.”” Perry v. Alessi, 890 A.2d 463, 467-68 (R.I. 2006) (quoting Schenck, 119 R.I. at 517, 382 A.2d at 518). Evidence is relevant if it “ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” R.I. R. Evid. 401. Additionally, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” R.I. R. Evid. 403. Because “[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it . . . the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than over lay witnesses.”” Dawkins v. Siwicki, 22 A.3d 1142, 1154 (R.I. 2011) (quoting DiPetrillo v. Dow Chemical Co., 729 A.2d 677, 688 (R.I. 1999)).

⁵ On appeal, the Rhode Island Supreme Court “will review a trial justice’s decision to grant a new trial because of his or her having committed an error of law during trial by employing a de novo analysis of the trial record . . . to determine if, in fact, an error of law exists in that record.” Votolato, 747 A.2d at 461. However, “[t]he admissibility of evidence, expert opinion or otherwise, ‘rests with the sound discretion of the trial justice and will not be disturbed on appeal absent an abuse of discretion.’” Riley v. Stone, 900 A.2d 1087, 1092 (R.I. 2006).

In Owens v. Silvia, 838 A.2d 881, 891 (R.I. 2003), the Supreme Court explained that the admissibility of expert testimony depends upon a two-part inquiry—reliability and helpfulness to the trier of fact. The first half of that inquiry was the issue in Owens, but the second half is helpful here. See id. Although Owens focused on the reliability prong for novel scientific evidence, which Plaintiff said Dr. Bressler’s testimony here was not, that Court nonetheless explained the requirement that an expert’s testimony “must be ‘sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.’” See id. at n.3. “If the testimony ‘logically advances a material aspect of the proposing party’s case,’ the court may deem it relevant and admissible.” Id. A trial justice ruling on the admissibility of an expert witness’s proffered testimony must “‘soundly and judicially exercise[]’” his or her discretion, meaning “‘in the light of reason applied to all the facts and with a view to the rights of all the parties to the action, . . . and not arbitrarily or willfully, but with just regard to what is right and equitable under the circumstances and the law.’” Id. at 890.

Here, Dr. Bressler’s testimony was that on August 24, 2004, Mr. Ribeiro had a detached retina that needed to be diagnosed and treated within a very short period of time. Indeed, Dr. Bressler testified that a physician should have attempted to have Mr. Ribeiro in an operating room as quickly as possible, specifically within twenty-four hours. The Owens Court explained that the expert testimony there was factually relevant because plaintiff’s expert witness’s proffered opinion on causation differed from the theory of causation offered by the defendants. See id. at 891 n.3. Here, the testimony and the pretrial motions rendered her testimony on the October OCT scans and Dr. You’s diagrams irrelevant.

Dr. Bressler was offered as an expert only on causation. Because the alleged negligence was limited to August 24, 2004, evidence of causation was appropriately similarly limited to that

date. During Dr. Bressler's testimony, as the Court ruled that Plaintiff was not able to ask the witness about the October OCT scans or Dr. You's November diagrams, the Court explained that if Defendants' questioning of Dr. Bressler suggested that Mr. Ribeiro's retina had become detached in October or November—that is, after the allegedly negligent August 24, 2004 appointment—then Plaintiff would be permitted to redirect Dr. Bressler and elicit her opinion that the October OCT scans and Dr. You's diagram show that the retina had been detached for a longer period of time. Contra id. (explaining that the “suggest[ion] that the injury could have taken place in the post-operative recovery unit after the surgery” made testimony about when a patient's injury occurred helpful to the trier of fact). The Court thus allowed for the proffered testimony if, during the causation portion of the trial, the issue of the duration of the detachment of Mr. Ribeiro's retina, rather than whether the August failure-to-diagnose caused Mr. Ribeiro's injuries, became “sufficiently tied to the facts of the case that it w[ould have] aid[ed] the jury in resolving a factual dispute.” See id. (quoting DiPetrillo, 729 A.2d at 689).

Given the particular nature of the expert testimony in this case—one expert, Dr. Greenstein, was permitted to testify about the standard of care but not causation and another expert, Dr. Bressler, was permitted to testify about causation but not the standard of care—there was a risk that Dr. Bressler's testimony about the October OCT scans and Dr. You's diagram would have confused the issues and misled the jury. See R.I. R. Evid. 403. The risk that the jury would conclude that Dr. Bressler, an ophthalmologist, was opining that Dr. Newman had breached the standard of care for an optometrist outweighed the probative value of her testimony about the diagnosis of Mr. Ribeiro's condition after the time frame in which she had testified surgery was necessary to avoid the eventual outcome. Because the Court must exercise additional control over expert witnesses as compared to lay witnesses, it was proper to preclude

Dr. Bressler from testifying about her interpretation of the OCT scans from two months after Mr. Ribeiro's condition was allegedly caused and Dr. You's diagram from even later. See Dawkins, 22 A.3d at 1154.

Although Mr. Ribeiro argues that Dr. Bressler should have been permitted to testify regarding the October OCT scans and Dr. You's diagrams because Dr. Greenstein had been questioned about them, this argument does not account for each expert's role in the trial. Dr. Greenstein was questioned about the October OCT results and whether they showed CSR, into which Dr. Greenstein testified that retinal detachment could not transform. Dr. Bressler's testimony was offered not for the purpose of demonstrating whether Dr. Newman breached the standard of care by failing to diagnose a retinal detachment in August, which was Dr. Greenstein's role, but rather for the purpose of showing what effect proper diagnosis and treatment in August would have had. See Perry, 890 A.2d at 467-68. The evidence was not relevant and what little probative value it may have had was outweighed by the risk that it would confuse the issues and mislead the jury.

Even assuming that the Court improperly excluded Dr. Bressler's testimony about the state of Mr. Ribeiro's condition long after the time that his condition had, in her opinion, become irreversible, such error was harmless. For an error of law to warrant a new trial, it must be prejudicial. See Votolato, 747 A.2d at 460 (quoting 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2805 at 55 (1995)). Harmless errors do not warrant a new trial. See id. at 464; Riley, 900 A.2d at 1098. In Riley, 900 A.2d at 1097-98, the Rhode Island Supreme Court concluded that because an expert witness "testified extensively" about the standard of care and causation, the fact that the witness was not allowed to testify that he relied on redacted medical records in forming his opinions was harmless error.

Here, Dr. Bressler testified that had Mr. Ribeiro undergone surgery on or about August 24, 2004, his vision would have remained as good as it was on that day. She said that immediate repair was necessary because delay would allow the retina to become further detached, and she opined on how the location of the detachment affected Mr. Ribeiro's prospects for restored vision following immediate surgery. Dr. Bressler's testimony was limited only to the extent that she intended to talk about Mr. Ribeiro's condition in October, two months after anything could have been done to prevent his permanent vision loss. Considering the purpose for which Dr. Bressler was offered, any error in precluding her testimony about Mr. Ribeiro's condition in October was harmless.

Mr. Ribeiro's Motion for a New Trial is therefore denied.

III

A

Defendants' Renewed Motions for Judgment as a Matter of Law or for a New Trial

Dr. Newman renewed his motion for judgment as a matter of law, regarding both the jury's verdict finding a breach of the standard of care and the issue of causation, and moved alternatively for a new trial on the issue of a breach of the standard of care. The Rhode Island Eye Institute, LLC made identical motions.

During trial, Dr. Greenstein was offered by Plaintiff as an expert on the standard of care of an optometrist. Dr. Greenstein explained that CSR is an accumulation of fluid behind the retina, typically in the center of the retina, and that retinal detachment is a more extensive detachment, usually starting at the retina's periphery. According to Dr. Greenstein, a "differential diagnosis" is the list of all possible causes of a patient's problem, each of which should be ruled out until the actual cause remains. Dr. Greenstein testified that performing a differential diagnosis is mandatory for an optometrist and that the standard of care required Dr.

Newman to rule out retinal detachment. There were several ways to rule out a retinal detachment, including an OCT exam, a dilated fundus exam, retinal photographs, and referral to a retinal specialist. Dr. Greenstein testified that although Dr. Newman could have ruled out retinal detachment with the OCT exam, he did not, and that he violated the standard of care for an optometrist by failing to rule out retinal detachment on August 24, 2004. Although Dr. Newman ordered an OCT exam, Dr. Greenstein opined that the results of that exam were more consistent with retinal detachment. Dr. Newman, therefore, should have referred Mr. Ribeiro to a retinal specialist on August 24, 2004.

On cross-examination, Dr. Greenstein testified about Mr. Ribeiro's condition, specifically that Mr. Ribeiro had described blurriness when he presented to Dr. Newman. Dr. Greenstein also admitted that Mr. Ribeiro's visual acuity was within the range for CSR, as stated in a textbook Dr. Greenstein described as authoritative. Additionally, Dr. Greenstein testified that making a follow-up appointment for six to eight weeks later is within the standard of care for treating a patient who has been diagnosed with CSR.

Dr. Greenstein was also asked on cross-examination about what the standard of care requires of an optometrist. When asked whether the standard of care required Dr. Newman to choose one of the methods previously described by Dr. Greenstein to confirm the diagnosis, Dr. Greenstein admitted that one method was sufficient and that the choice of an OCT exam was also within the standard of care. Although he had previously testified that Plaintiff's OCT results were more consistent with retinal detachment, according to his testimony on cross-examination Dr. Greenstein was familiar with OCT exams from manuals and lectures but had never used an OCT exam in his practice. Additionally, Dr. Greenstein testified that he referred to a textbook to see how various conditions would appear in OCT scans, but that book did not depict an OCT

exam showing a detached retina. On the topic of whether the standard of care required Dr. Newman to refer Mr. Ribeiro to a retinal specialist, Dr. Greenstein agreed that if an optometrist believed that he or she had enough information and that a diagnosis is correct, referral is not required.

Plaintiff's October 2004 appointment with Dr. Newman, at which Dr. Newman again diagnosed Mr. Ribeiro with CSR and referred him to a retinal specialist, was also discussed during the cross-examination of Dr. Greenstein. Dr. Greenstein said that the October OCT scans were consistent with CSR and that while CSR can worsen into a retinal detachment, albeit atypically, the opposite is not true: a retinal detachment cannot become CSR.

Dr. Newman argues that there was insufficient evidence for a reasonable jury to conclude that he breached the standard of care or that any negligence proximately caused Mr. Ribeiro's injuries. Additionally, Dr. Newman argues that the jury's verdict, which found that he breached the standard of care but that breach did not cause Mr. Ribeiro's injuries, was against the weight of the evidence.

B

Standards of Review

Rule 50 of the Superior Court Rules of Civil Procedure provides

“If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party.”

Super. R. Civ. P. 50(a)(1).⁶ “When ruling on a Rule 50 motion for judgment as a matter of law,

⁶ If a court does not grant a motion for judgment as a matter of law made at the close of all the evidence, “the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.” Super. R. Civ. P. 50(b). A party may

the trial justice is called upon to consider ‘the evidence presented at trial in the light most favorable to the nonmoving party, without weighing the evidence or evaluating the credibility of witnesses.’” Almonte v. Kurl, 46 A.3d 1, 16 (R.I. 2012) (quoting Swerdlick v. Koch, 721 A.2d 849, 856 (R.I. 1998)). “[I]f there are factual issues concerning which reasonable people may reach differing conclusions,” then the motion must be denied. Id. (citing Botelho v. Caster’s Inc., 970 A.2d 541, 545 (R.I. 2009)).

When considering a motion for a new trial based on the verdict being against the weight of the evidence, “[a] trial justice’s role . . . is that of a superjuror, who must weigh the evidence and assess the credibility of the witnesses.” McGarry v. Pielech, 47 A.3d 271, 280 (R.I. 2012) (quoting Pollard v. Hastings, 862 A.2d 770, 777 (R.I. 2004)). Unlike the evaluation of a Rule 50 motion, in making his or her “independent appraisal of the evidence in light of his [or her] charger to the jury,” the trial justice “is permitted to ‘weigh the evidence and assess the witnesses’ credibility,” and “can reject some evidence and draw inferences [that] are reasonable in view of the testimony and evidence in the record.” Almonte, 46 A.3d at 17 (first alteration in original) (quoting Kurczy v. St. Joseph Veterans Assoc., Inc., 713 A.2d 766, 770 (R.I. 1998); Ruggieri v. Big G Supermarkets, Inc., 114 R.I. 211, 215-16, 330 A.2d 810, 812 (1975)). If the trial justice concludes “that the evidence is evenly balanced” or “that reasonable minds in considering the same evidence could come to different conclusions,” then the motion for a new trial must be denied. See id. (quoting Botelho, 970 A.2d at 545). A trial justice determining that “the verdict is not a proper response to the evidence” should grant the motion for a new trial. Perkins v. City of Providence, 782 A.2d 655, 656 (R.I. 2001) (quoting

renew such a motion after the verdict and may request a new trial in the alternative, as is the case here. See id. A court may “allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law.” Id.

Kurczy, 713 A.2d at 770). “Although the trial justice need not perform an exhaustive analysis of the evidence, he or she should refer with some specificity to the facts [that] prompted him or her to make the decision so that the reviewing court can determine whether error was committed.” Recco v. Criss Cadillac Co., Inc., 610 A.2d 542, 545 (R.I. 1992) (citing Zarella v. Robinson, 460 A.2d 415, 418 (R.I. 1983)).⁷

C

Analysis

“In any negligence action, including medical malpractice, the plaintiff has the burden to establish that the defendant had a duty to act or refrain from acting and that there was a causal connection between his or her breach of that duty and the plaintiff’s injury.” Perry, 890 A.2d at 467 (citing Schenck, 119 R.I. at 514, 382 A.2d at 516-17). Although a “physician is not a guarantor of either a correct diagnosis or a successful course of treatment,” he or she “is bound to exercise the same degree of diligence and skill as physicians in good standing engaged in the same type of practice.” Id. (quoting Sousa v. Chaset, 519 A.2d 1132, 1135 (R.I. 1987)). Unless the negligence would be obvious to a layperson, expert testimony is required to prove the standard of care from which the defendant must not deviate. See Sheeley v. Mem’l Hosp., 710 A.2d 161, 164 (R.I. 1998) (citing Richardson v. Fuchs, 523 A.2d 445, 448 (R.I. 1987)). After a breach of the standard of care is shown, a plaintiff must prove a causal connection between the breach and his or her injuries. See Perry, 890 A.2d at 467-68.

⁷ The decision of a trial justice who “has carried out the duties required by Rule 59 . . . and [the Supreme Court’s] decided cases” will be “accorded great weight by [the Rhode Island Supreme] Court and will not be disturbed unless the [challenging party] ‘can show that the trial justice overlooked or misconceived material and relevant evidence or was otherwise clearly wrong.’” Botelho, 970 A.2d at 546 (quoting Int’l Depository, Inc. v. State, 603 A.2d 1119, 1123 (R.I. 1992)).

Perry was a failure-to-diagnose case in which a woman who had a bowel obstruction had been misdiagnosed with kidney stones. Id. at 467-68. There, an expert in emergency care testified that the woman's symptoms did not support the original diagnosis, that a kidney stone was an atypical condition for someone of the woman's profile, that an untreated bowel obstruction could lead to a bowel perforation, and that there would have been a "different result" had the proper diagnosis been made. Id. at 468. The Perry Court concluded that there was extensive testimony as to the reasons that the expert concluded that the defendant breached the standard of care, and sufficient evidence from which the jury could infer that the woman's injuries were "most probably" caused by that negligence. Id.

Here, Mr. Ribeiro presented the expert testimony of both Dr. Greenstein and Dr. Bressler. Dr. Greenstein testified that the standard of care required Dr. Newman to eliminate retinal detachment as a possibility for Mr. Ribeiro's condition. He testified that although Dr. Newman ordered an OCT exam, which is one of the methods that Dr. Greenstein testified that an optometrist may use to rule out retinal detachment, Dr. Greenstein's testimony was that the standard of care required Dr. Newman to rule out retinal detachment, which the OCT scans did not do. Dr. Greenstein testified that the August OCT scans were consistent with retinal detachment. According to Dr. Greenstein's direct testimony, the standard of care for an optometrist required Dr. Newman to rule out retinal detachment, definitively rule in CSR, or refer Mr. Ribeiro to a retinal specialist, none of which Dr. Newman did.

Although Dr. Greenstein was subject to cross-examination during which he agreed that the choice of an OCT to confirm a diagnosis was within standard of care and that if an optometrist is sure of a diagnosis, then referral to a specialist is not necessary, in considering a Rule 50 motion, the Court must view the evidence in the light most favorable to Mr. Ribeiro

without weighing the evidence or evaluating the credibility of witnesses. See Almonte, 46 A.3d at 16. Dr. Greenstein testified that Dr. Newman was required to rule out a detached retina and that an OCT exam could be used to do this, but that the August OCT scans did not eliminate retinal detachment as Mr. Ribeiro's condition. The August OCT showed a buildup of fluid that was located in a position that made the result more consistent with retinal detachment than with CSR. Dr. Newman admitted during cross-examination that some of Mr. Ribeiro's symptoms were consistent with retinal detachment, that he ordered the OCT to confirm his diagnosis of CSR, and that the August OCT could have been consistent with a detached retina, although he testified that he did not interpret it that way. In seeking a motion for judgment as a matter of law, Defendants are asking the Court to accept one witness' version over another, which is improper in deciding a Rule 50 motion. See Almonte, 46 A.3d at 16. Taking the evidence in the light most favorable to Mr. Ribeiro, there is sufficient evidence from which a jury could conclude that Dr. Newman breached the standard of care for an optometrist by failing to rule out a detached retina, the most serious condition that Mr. Ribeiro may have had.

Thus, Defendants' renewed motions for judgment as a matter of law regarding Dr. Newman's breach of the standard of care are denied.

Similarly, Defendants' motions for a new trial regarding Dr. Newman's breach of the standard of care are denied. The Court, acting as it should as a "superjuror," is not convinced that the verdict fails to respond to the evidence. See Perkins, 782 A.2d at 656. Although Dr. Newman was credible in his testimony regarding the August 24, 2004 appointment and why he diagnosed Mr. Ribeiro with CSR, Dr. Greenstein was likewise credible in his explanation that Dr. Newman failed to rule out a detached retina. Dr. Newman explained that the diagnosis of CSR was based on Mr. Ribeiro's description of his vision, visual acuity, and demographic

characteristics—CSR is more likely for people of a certain age. While Dr. Newman ordered an OCT exam, which Dr. Greenstein said was one method that an optometrist could properly use to eliminate retinal detachment, the optometrists disagreed in their interpretation of whether the OCT exam showed a detached retina. Importantly, Dr. Greenstein maintained that the standard of care required elimination of the most serious cause, retinal detachment, and Dr. Newman admitted that the OCT scans could be consistent with a detached retina after stating that he ordered them to confirm CSR, rather than eliminate a detached retina.⁸ Thus, even though Dr. Greenstein was cross-examined about Dr. Newman’s diagnosis of CSR and whether he did everything necessary to diagnose that condition, the standard of care articulated by Dr. Greenstein required Dr. Newman to determine that Mr. Ribeiro did not have a detached retina. Dr. Newman’s own admission that the OCT scans, which were the method he chose to confirm his diagnosis and eliminate retinal detachment, were consistent with retinal detachment is quite harmful to his contention that he did not breach the standard of care.

Based on its review of the evidence regarding an optometrist’s standard of care and Dr. Newman’s breach thereof, the Court is satisfied that the evidence is evenly balanced or, at the very least, reasonable minds viewing the evidence could come to different conclusions. Therefore, Defendants’ motions for a new trial on the issue of Dr. Newman’s breach of the standard of care are denied.

Regarding causation, Defendants’ renewed motions for judgment as a matter of law regarding causation are similarly denied. Dr. Bressler testified that a rhegmatogenous retinal detachment is a far more serious condition that must be repaired quickly and that if Mr. Ribeiro had been referred to a retinal specialist in August 2004, his retinal detachment would have been

⁸ Both of these optometrists have similar training in interpreting OCT scans.

diagnosed and promptly treated with surgery, likely saving Mr. Ribeiro's vision. Retinal detachment's more serious nature was a consistent fact among the various witnesses. Dr. Bressler specifically testified that if Mr. Ribeiro's retinal detachment had been repaired successfully shortly after his August 24, 2004 appointment, his vision more likely than not would have been at least as good as it had been that day, with a reasonable likelihood of 20/20 vision. She testified that every moment of delay worsened Mr. Ribeiro's prognosis because the retina could become further detached. Because the retinal detachment impacted the very center of the retina, called the fovea, only minimally in August, it likely could have been reattached and Mr. Ribeiro's vision would have been restored. Dr. Bressler based her opinion on the physiology of the eye and analogies to other retinal diseases. Mr. Ribeiro's vision loss in his right eye was permanent in Dr. Bressler's opinion, which she based on the fact that his optic nerve atrophied after his retina detached.

The Court is satisfied, based on the evidence presented and without weighing that evidence or evaluating credibility, that there was sufficient evidence that a jury could conclude that Dr. Newman's negligence caused Mr. Ribeiro's condition. Thus, Defendants' motion for judgment as a matter of law regarding causation is denied.

IV

Conclusion

For the foregoing reasons, Plaintiff's motion for a new trial is denied, and Defendants' motions for judgment as a matter of law or, alternatively, for a new trial are denied. Counsel for Defendants shall submit an appropriate order for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Ribeiro v. The Rhode Island Eye Institute, LLC, et al.

CASE NO: PC 07-4069

COURT: Providence County Superior Court

DATE DECISION FILED: March 27, 2013

JUSTICE/MAGISTRATE: Clifton, J.

ATTORNEYS:

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