CYNTHIA LYNCH and DENNIS LYNCH, Plaintiffs-Appellants,
v.
MARK J. PRESSMAN, M.D., Defendant-Respondent, and
LAWRENCE ORTHOPEDICS, Defendant.

No. A-0847-13T1.

Superior Court of New Jersey, Appellate Division.

Argued March 4, 2015.
Decided March 19, 2015.

Kenneth B. Grear argued the cause for appellants.

James Moody argued the cause for respondent (Orlovsky Moody Schaaff Conlon & Gabrysiak, attorneys; Mr. Moody, of counsel; Erin A. Bedell, on the brief).

Before Judges Alvarez, Waugh, and Carroll.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

In this medical malpractice action, plaintiff Cynthia Lynch asserted negligence and lack of informed consent claims against defendant, Mark J. Pressman, M.D., arising out of carpal tunnel surgery he performed on plaintiff's hand. The negligence claim was dismissed prior to trial, and the matter proceeded on plaintiff's informed consent claim. After trial, the jury entered a verdict of no cause in favor of defendant. Plaintiff now appeals, arguing that the trial court improperly barred portions of her expert's de bene esse testimony and failed to properly answer the jury's questions during deliberations. We disagree and affirm.

I.

We discern the following facts from the trial record. On July 2, 2008, defendant performed endoscopic carpal tunnel release (CTR) surgery on plaintiff's dominant right hand. After the surgery, plaintiff experienced pain and numbness in the fingers and palm of the hand.

On August 27, 2008, defendant performed open CTR surgery on the same hand to better visualize the source of plaintiff's pain and numbness. During the surgery, defendant discovered that he had severed plaintiff's common digital nerve in the previous endoscopic procedure, and performed microscopic repair on the nerve. Plaintiff continues to suffer from pain and numbness in the third and fourth fingers and palm

of her right hand.

Plaintiff filed a three-count complaint on July 2, 2010. The first count alleges that defendant was negligent in the performance of her CTR surgery. The second count alleges that defendant failed to adequately inform plaintiff of all the risks and complications associated with the surgery. The third count asserts a demand for damages based on loss of consortium to Dennis Lynch, plaintiff's husband.

Plaintiff claims that prior to the surgery, defendant never explained the increased risk of nerve damage associated with endoscopic CTR surgery, as compared to the lower risk with open CTR surgery. Instead, plaintiff alleges that defendant only recommended the endoscopic procedure. Additionally, plaintiff claims that defendant never informed her that his experience with performing endoscopic CTR surgery consisted of less than ten percent of all surgical procedures that he routinely performed. Plaintiff avers that had she been aware of defendant's lack of experience and the risks associated with endoscopic CTR surgery, she never would have consented to the procedure.

On November 26, 2012, plaintiff conducted the videotaped de bene esse deposition of her expert, Matthew M. Tomaino, M.D. During his videotaped deposition, Tomaino opined that defendant failed to provide plaintiff with full information regarding the increased risks associated with the endoscopic surgery as compared to the more traditional open procedure. Tomaino also testified that he believed defendant failed to advise plaintiff of his lack of experience performing endoscopic CTR surgeries which, in Tomaino's opinion, heightened the risk of nerve injury.

Prior to trial, defendant moved in limine to bar those portions of Tomaino's de bene esse testimony in which he discussed his contention that defendant had withheld factual information concerning his level of experience. Specifically, defendant objected to Tomaino's testimony that defendant did not obtain informed consent and that defendant misrepresented his experience and credentials to plaintiff.

After hearing oral argument and reviewing supplemental briefs submitted by the parties, the trial judge issued an opinion barring four portions of Tomaino's testimony.[1] In the first, third, and fourth barred portions of the testimony, Tomaino explicitly opined that defendant did not obtain informed consent from plaintiff. Regarding these portions, the trial judge explained that Tomaino "is prohibited from offering expert opinion on the topic of informed consent based upon the prudent patient standard" as set forth in Largey[2] and Febus.[3]

In the second barred portion of the testimony, Tomaino explained that "the more experienced one is with endoscopic techniques[,] the lower the relative risks [of nerve injury] become." Tomaino also noted that defendant is a general orthopedic surgeon, who, at the time of plaintiff's surgery, did not have a certificate of added qualification and mainly performed open CTR surgeries. In Tomaino's opinion, defendant's lack of experience increased plaintiff's risk of suffering nerve damage. The judge concluded that there was no evidence that defendant made any misrepresentations about his credentials or experience, thus distinguishing this case from Howard v. Univ. of Med. & Dentistry of N.J., 172 N.J. 537 (2002). The judge further noted that there is no requirement that an orthopedic surgeon have a certificate of added qualification to perform endoscopic CTR surgery.

In addition to these evidence rulings, on August 26, 2013, the judge entered an order dismissing count one of plaintiff's complaint. In an attached statement of reasons the judge explained:

> Plaintiff has provided no expert testimony to establish a claim that [defendant] was negligent with respect to his treatment as it relates to the operative procedure performed. As set forth in Dr. Tomaino's report, [defendant] failed to obtain informed consent for the carpal tunnel surgery. The entire focus is on the informed consent issue.
>
> There has been no expert testimony to establish that [defendant] was negligent with regard to the surgical procedure itself. Therefore, the [f]irst [c]ount of plaintiff's [c]omplaint should be dismissed.

Plaintiff does not appeal this dismissal.

During its deliberations, the jury sent the court a note indicating that it was unable to reach a verdict. The judge instructed the jurors in accordance with Model Jury Charge (Civil), 1.20, "Supplemental Instructions as to Further Deliberations by Jury" (1996), and the jury then returned to the jury room. Shortly after resuming deliberations, the jury sent another note asking if the judge could reread the entire jury instruction and provide plaintiff's and defendant's deposition transcripts. The jury was brought back into the courtroom and the following exchange occurred:

> THE COURT: The record should reflect that there was a question from the members of the jury. I reviewed the question with counsel, okay, and provide you with the following answers.
>
> Regarding the jury instructions from today, I cannot read you the whole jury instruction. If there's certain segments or areas that you wish the [c]ourt to read, I will read them, okay. And number two, I cannot give you the deposition of the plaintiff and the defendant. That is not evidence.
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> UNIDENTIFIED MALE SPEAKER: For one, I think we're all (indiscernible) enough that we —
>
> THE COURT: Okay. Hold on for one second. Hold on. On the jury instructions, if there's just a specific area of the jury instruction I can read that to you, if you know exactly what area that is. You need to decide that. I'll excuse you.
>
> As to the deposition of the plaintiff and the defendant, . . . that deposition is not evidence, okay. So what I can do is excuse you. You need to decide exactly what sections. For me to read the whole jury instruction it's going to take at least 45 minutes, okay.
>
> Or unless you're unable to reach a verdict, I will address that after you tell me what jury instructions that you need, okay. So after you — I'll excuse you and you can just handwrite the note to the officer and she'll bring it in to me while I'm in court. Okay? Thank you. All rise.

After the jury left the courtroom, the judge discussed the juror's comment with counsel. The judge

informed counsel that rather than have a single juror make a statement in open court, he instead wished to have the jury return to the jury room and jointly discuss what additional instruction it was seeking.

The jury did not return to the courtroom, but instead deliberated further and reached a verdict nearly forty minutes later. In answer to the first question on the verdict sheet, five of the six jurors found that defendant had provided plaintiff with all of the information that a reasonably prudent patient would expect in order to make an informed decision about the course of her treatment. Following this jury verdict in favor of defendant, the court entered a dismissal order on September 4, 2013. This appeal ensued.

II.

On appeal, plaintiff seeks a new trial, contending that the trial court's evidentiary rulings regarding Tomaino's de bene esse deposition testimony constituted reversible error. Plaintiff also asserts error regarding the court's response to the jury's request for additional instructions. We address each of these arguments in turn.

A.

Plaintiff first argues that the trial court erred in striking Tomaino's expert medical testimony, specifically with regard to defendant's alleged lack of experience performing endoscopic CTR surgery. Plaintiff contends that endoscopic CTR surgery carries increased risks as compared to the more traditional open procedure, and that defendant's relative inexperience added to this increased risk.

An appellate court applies a "deferential approach to a trial court's decision to admit expert testimony, reviewing it against an abuse of discretion standard." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371-72 (2011) (citing Kuehn v. Pub Zone, 364 N.J. Super. 301, 319-21 (App. Div. 2003), certif. denied, 178 N.J. 454 (2004)). Accordingly, the trial judge's decision "should stand unless so wide of the mark that it results in a manifest denial of justice." Bitsko v. Main Pharmacy, Inc., 289 N.J. Super. 267, 284 (App. Div. 1996). "Absent a clear abuse of discretion, an appellate court will not interfere with the exercise of that discretion." Carey v. Lovett, 132 N.J. 44, 64 (1993).

Negligence actions predicated on lack of informed consent are governed by the standard set forth in Largey, supra, 110 N.J. at 211-15, wherein the Supreme Court explicitly adopted the "prudent patient" standard. Under this standard, a physician has a duty to "warn of the dangers lurking in the proposed treatment and to impart information [that] the patient has every right to expect, as well as a duty of reasonable disclosure of the choices with respect to proposed therapy and the dangers inherently and potentially involved." Id. at 211 (alteration in original) (citation and internal quotation marks omitted).

Because the current standard requires that the disclosure be viewed from the perspective of the reasonable patient, not the physician, we have held that "expert testimony is no longer required in order to establish the medical community's standard for disclosure and whether a physician failed to meet that standard." Febus, supra, 260 N.J. Super. at 327; see also Kimmel v. Dayrit, 301 N.J. Super. 334, 353

(App. Div.), aff'd, 154 N.J. 337 (1998) ("[T]he duty to inform a patient of all reasonable options is a standard of care well within the understanding of a lay jury and requires no expert testimony.") Expert testimony, however, may still be necessary to prove "that the risk was one of which the physician should have been aware, and that it was recognized within the medical community." Febus, supra, 260 N.J. Super. at 327.

Thus, to establish negligence premised on a theory of liability for lack of informed consent, a plaintiff must prove: "(1) the physician failed to comply with the [prudent patient] standard for disclosure; (2) the undisclosed risk occurred and harmed the plaintiff; (3) a reasonable person under the circumstances would not have consented and submitted to the operation or surgical procedure had he or she been so informed; and (4) the operation or surgical procedure was a proximate cause of [the] plaintiff's injuries." Teilhaber v. Greene, 320 N.J. Super. 453, 465 (App. Div. 1999) (citation and internal quotation marks omitted).

The information that must be disclosed "depends on what a reasonably prudent patient would deem significant in determining whether to proceed with the proposed procedure." Howard, supra, 172 N.J. at 548. See also Model Jury Charge (Civil), 5.50C, "Informed Consent" (2002) ("a risk of a medical procedure is material when a reasonable patient in the plaintiff's position would be likely to attach significance to it in deciding whether or not to submit to the treatment").[4]

Plaintiff's argument is specifically confined to the second and third barred portions of Tomaino's deposition testimony, which relate to defendant's experience performing endoscopic CTR surgery:

> Q. Okay. What is it about [the] experience of the surgeon, here [defendant], but what is it about the experience of the doctor with respect to doing open or closed carpal tunnel surgery, what is the effect of the experience on whether or not there's more of a risk or less of a risk with either procedure? Can you describe that for the jury?
>
> A. Well, in general it is felt that the more experienced one is with endoscopic techniques the lower the relative risks become, and that they may in fact become relatively equivalent to the risk of nerve injury while doing an open carpal tunnel. But with relative inexperience, [] the risks of significant nerve injury with the closed or endoscopic techniques are in fact higher than the risks were the person to perform carpal tunnel release with direct visualization.
>
> Q. Dr. Tomaino, what was your understanding in preparation of your report and testifying here today, what is your understanding of [defendant]'s experience related to endo[scopic] carpal tunnel surgery versus open carpal tunnel surgery as it existed as of July 2008?
>
> A. Well, based on [defendant's] testimony, the vast majority of the carpal tunnel surgery he did was open carpal tunnel surgery.
>
> . . . .
>
> A. Well, the fact that [defendant] is a general orthopedic surgeon and does not have a

> certificate of added qualification and is not a focused hand surgeon, certainly in conjunction with his acknowledgment that 95% of the surgery he does is open surgery would lead me to believe his experience with endoscopic techniques is less than what it may be by comparison to someone else who does them all the time.
>
> Q. And with respect to what you just said, what effect would that have in your opinion on the increased risk of performing an endoscopic procedure versus an open procedure in this particular case?
>
> A. Well, in my opinion that would increase the risk . . . tremendously beyond the risk of performing the same procedure through an open technique.

The barred portions of Tomaino's testimony concluded with his "opinion [] that informed consent was not obtained. And it is in part due to the absence of a discussion of the risks based on [defendant's] experience with endoscopic [CTR]."

Plaintiff argues on appeal that Tomaino's testimony pertaining to defendant's inexperience was improperly excluded under Howard. In Howard, the Court extended the traditional informed consent analysis to a situation where a physician made affirmative misrepresentations to a patient about his credentials and experience. Howard, supra, 172 N.J. at 555-59. Specifically, the defendant in Howard falsely claimed to be board certified and to have performed approximately sixty of the relevant surgeries annually over a period of eleven years. Id. at 543-44. In fact, the physician was board eligible rather than board certified, and had performed only several dozen surgeries in his entire career. Id. at 544. The Court concluded that "[i]n certain circumstances, a serious misrepresentation concerning the quality or extent of a physician's professional experience, viewed from the perspective of the reasonably prudent patient assessing the risks attendant to a medical procedure, can be material to the grant of intelligent and informed consent to the procedure." Id. at 555.

The Court observed that "most informed consent issues are unlikely to implicate a setting in which a physician's experience or credentials have been demonstrated to be a material element affecting the risk of undertaking a specific procedure." Id. at 557. This is because "physician experience is not information that directly relates to the procedure itself or one of the other areas of required medical disclosure concerning the procedure, its substantial risks, and alternatives that must be disclosed to avoid a claim based on lack of informed consent." Id. at 557-58. Nevertheless, the Court recognized that the possibility of materiality can be present if the physician's "true level of experience had the capacity to enhance substantially the risk [of the procedure]." Id. at 558.

The Court went on to note that the standard for causation "will impose a significant gatekeeper function on the trial court to prevent insubstantial claims concerning alleged misrepresentations about a physician's experience from proceeding to a jury." Ibid. It explained that the proximate cause analysis requires a two-step inquiry:

> The first inquiry should be, assuming a misrepresentation about experience, whether the

> more limited experience or credentials possessed by [the] defendant could have substantially increased [the] plaintiff's risk. . . . The second inquiry would be whether that substantially increased risk would cause a reasonably prudent person not to consent to undergo the procedure. . . . The court's gatekeeper function in respect of the first question will require a determination that a genuine issue of material fact exists requiring resolution by the factfinder in order to proceed to the second question involving an assessment by the reasonably prudent patient.
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> [Id. 558-59.]

Regarding an affirmative duty to disclose credentials, the Supreme Court observed that "[o]ur case law never has held that a doctor has a duty to detail his background and experience as part of the required informed consent disclosure; nor are we called on to decide that question here." Id. at 554. Additionally, the Court noted that other "[c]ourts generally have held that claims of lack of informed consent based on a failure to disclose professional-background information are without merit." Id. at 555.

In the present case, there is no evidence in the record that defendant made any misrepresentations about his experience or credentials, nor does plaintiff claim any. Instead, plaintiff merely alleges that defendant did not inform her that endoscopic CTR surgeries comprise only ten percent of all the surgeries he performs. This nondisclosure does not rise to the level of the misrepresentations contemplated in Howard to be sufficient to undermine the validity of the patient's consent. Moreover, Tomaino testified that there is no requirement that an orthopedic surgeon have a certificate of added qualifications to perform endoscopic CTR surgery. Aside from reiterating defendant's admission that less than ten percent of the procedures he performs are endoscopic CTR, Tomaino otherwise provided no basis for his opinion that defendant was "inexperienced" in performing this procedure. Accordingly, the trial court properly struck these portions of Tomaino's proffered testimony.

B.

We next address plaintiff's argument that the trial judge erred by refusing to reread the jury instructions. Additionally, plaintiff claims that a juror made a specific request to which the trial judge failed to respond.

When juries pose questions, the trial judge "is obligated to clear the confusion." State v. Savage, 172 N.J. 374, 394 (2002) (quoting State v. Conway, 193 N.J. Super. 133, 157 (App. Div.), certif. denied, 97 N.J. 650 (1984)). The trial court "must respond substantively to questions asked by the jury during deliberations and must assure itself that it understands the import of the questions." State v. Middleton, 299 N.J. Super. 22, 30 (App. Div. 1997) (citing State v. Graham, 285 N.J. Super. 337, 342 (App. Div. 1995)).

Since plaintiff's counsel did not object to the trial court's handling of the jury's questions during deliberations, we consider the issue under the plain error rule. R. 2:10-2. The question is whether the error "led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336

(1971). In civil cases, relief under the plain error rule "is discretionary and should be sparingly employed."Cavuoti v. N.J. Transit Corp., 161 N.J. 107, 129 (1999) (citation and internal quotation marks omitted).

Here, the initial question posed by the jury lacked detail. To determine its scope, the trial judge instructed the jury "to decide [on] exactly what sections" of the jury instructions it required clarification. The judge agreed to reread portions of the instructions, once they were specifically requested. The trial judge's response sufficiently resolved the issue by unequivocally instructing the jurors to determine which specific instructions they wished to have reread.

There is no support for plaintiff's assertion that a juror asked a question regarding the instructions that the trial judge ignored. The record indicates that an unidentified juror interrupted the trial judge with an indiscernible remark, to which the judge responded "hold on." The judge then directed the jury to determine which sections of the instructions it needed reread and then submit the requests in writing to the court.

After the jury exited the courtroom, the trial judge informed counsel that he did not wish the juror to say anything in open court, but rather wanted the jurors to decide as a group the clarifications they were seeking. Plaintiff's counsel agreed with this procedure and posed no objection to it. The trial judge's decision to have the jury submit its specific requests in writing, rather than have a single juror ask a question in open court, was a reasoned exercise of discretion. Moreover, plaintiff has failed to establish that any error in this regard was "clearly capable of producing an unjust result." R. 2:10-2.

Affirmed.

[1] The barred portions were: (1) page 56, lines 4 to 13; (2) page 73, line 12 through page 76, line 22; (3) page 89, line 8 through page 90, line 18; and (4) page 92, lines 7 to 19.

[2] Largey v. Rothman, 110 N.J. 204 (1988).

[3] Febus v. Barot, 260 N.J. Super. 322 (App. Div. 1992).

[4] Furthermore, footnote ten of the Model Jury Charge notes that "under Largey[,] expert testimony cannot be used to establish the applicable standard as to what information must be disclosed;" however, "such testimony may be required or, at least, admissible on the question of the degree to which a risk was or was not remote or small."