

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-321

KELLY A. GUSTUS¹

vs.

MASANORI TAKEOKA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Kelly A. Gustus, on behalf of her minor daughter, Nova, filed a medical malpractice action in the Superior Court against defendant Dr. Masanori Takeoka and others for their failure to timely diagnosis Nova with sagittal synostosis. A jury returned a verdict in favor of Takeoka, the only defendant remaining at the time the case was submitted to the jury.² On appeal, Gustus contends that the trial judge erred by permitting a defense expert to testify to matters outside the scope of his pretrial disclosure, by excluding certain testimony

¹ Individually and as next friend of Nova Pierce.

² Gustus also listed as defendants in her complaint Gary Francis Rogers, M.D.; Omar S. Khwaja, M.B. Bch.; and Children's Hospital Boston. As to each of these defendants Gustus entered into a stipulation of dismissal with prejudice, resulting in judgments entering separate from the judgment containing the jury verdict.

of her expert, and by denying her motion for a new trial. We affirm.

Discussion. 1. Defendant's expert witness. Gustus contends that the judge erred by allowing defense expert Dr. Michael L. Cunningham to testify that Nova's sagittal synostosis was not present at the time of her birth and that her condition developed later. Gustus asserts that this testimony went beyond the scope of Cunningham's pretrial disclosure.

"Our rules of civil procedure direct parties to disclose the identity of expert witnesses they plan to call and the 'subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.'" Larkin v. Dedham Med. Assocs., Inc., 93 Mass. App. Ct. 661, 666 (2018), quoting Mass. R. Civ. P. 26 (b) (4) (A) (i), 365 Mass. 772 (1974). See Rule 30B of the Rules of the Superior Court (requiring disclosure, signed by expert to certify its accuracy, to be included in pretrial conference memorandum). The purpose of such disclosures is "to facilitate the fair exchange of information about critical witnesses and to prevent unfair surprise." Kace v. Liang, 472 Mass. 630, 636-637 (2015). A judge has wide discretion to admit or exclude expert testimony that has not been adequately disclosed, and an appellate court will not disturb the judge's exercise of such

discretion absent "prejudicial error resulting from an abuse of discretion." Id. at 637, quoting Wilson v. Honeywell, Inc., 409 Mass. 803, 809 (1991).

Gustus contends that she was unfairly surprised at trial because Cunningham's pretrial disclosure did not include his trial testimony that Nova's "sagittal craniosynostosis was not present at birth . . . , and that it had to have occurred after the MRI administered in August 2009," that is, after she was seen by Takeoka. A review of Cunningham's disclosure reveals that the defendants provided ample notice of Cunningham's testimony.

Cunningham's disclosure states that he was expected to testify that Nova's diagnosis was "consistent with a very late post-natal fusion, an atypical presentation of synostosis." His disclosure details his review of the records of Nova's medical visits and examinations from July 29, 2008, to January 6, 2011, in which he found no conditions suggesting the presence of craniosynostosis. He was expected to testify that it was not until Nova's March 7, 2011 visit with Dr. John Meara that a "new finding" of "macrocephaly with mild scaphocephaly" made it appropriate to order a computerized tomography (CT) scan "to rule out the possibility of sagittal synostosis." Cunningham would testify that Nova's August 2009 magnetic resonance imaging test was "in marked contrast" with her March 2011 CT scan, as

the first did not include any clinical evidence of sagittal synostosis. Cunningham's trial testimony was consistent with his disclosure, and the judge did not abuse his discretion in permitting Cunningham to testify as he did.

2. Plaintiff's expert witness. Gustus further contends that a motion judge and the trial judge erred by precluding her expert, Dr. Joseph S. Gruss, from testifying that Nova had cognitive deficits, and that the late diagnosis of craniosynostosis contributed to those deficits. Takeoka objected to such testimony because it was first included in Gruss's supplemental disclosure, served about one week before trial.

The scheduling order set a deadline of June 15, 2017, for the filing of expert witness disclosures, with trial expected to commence on December 6, 2017. Gustus's counsel provided Gruss's supplemental disclosure to the defendants on November 27, 2017. Takeoka filed an objection, and the motion judge, treating the objection as a motion to exclude new information contained in the supplemental disclosure, allowed it on December 4, 2017, on the grounds that the disclosure "was made significantly past the deadline and only a little over a week before trial," and contained new information that would prejudice Takeoka.

The trial was continued to May 29, 2018, however, and on December 19, 2017, Gustus sought reconsideration of the motion

judge's ruling. The motion judge denied reconsideration, reiterating, "The supplemental disclosure included new substantive areas and was filed substantially past the deadline for expert disclosures." At the final pretrial conference, the trial judge denied Gustus's oral motion for further reconsideration.

Judges have broad discretion to exclude expert testimony for untimely disclosure. See Kace, 472 Mass. at 637; Kearns v. Ellis, 18 Mass. App. Ct. 923, 924-925 (1984). We discern no abuse of discretion in the motion and trial judges' decisions to exclude Gruss's testimony on matters contained in the supplemental disclosure. Although, as it turned out, the supplemental disclosure was made six months prior to trial, it was not produced until well after the filing deadline.

In any event, Gustus was not prejudiced by the restriction of Gruss's testimony. To prevail in a medical malpractice case, the plaintiff must "demonstrate that the health care provider did not conform to good medical practice" and then "establish resulting damage." Saunders v. Ready, 68 Mass. App. Ct. 403, 404 (2007). Because the jury specifically found that Takeoka was not negligent in his failure to diagnosis Nova's condition, the jury did not need to consider the issue of causation.

Gruss's testimony on the issue, if it had been allowed, would not have made a difference.³

3. Motion for new trial. Finally, Gustus argues that the trial judge should have granted her motion for a new trial in light of Cunningham's contradictory and generally untrustworthy testimony. The new trial motion, however, did not address the reliability of Cunningham's testimony. Rather, the motion was based primarily on the exclusion of Gruss's testimony, with the contention that Cunningham's testimony exceeded his disclosure mentioned in passing. Gustus never sought to exclude Cunningham's testimony under Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), or Commonwealth v. Lanigan, 419 Mass. 15 (1994), and she may not do so for the first time on appeal. See Driscoll v. Providence Mut. Fire Ins. Co., 69 Mass. App. Ct. 341, 342 n.3 (2007). The issues of Cunningham's credibility

³ Gruss testified essentially for one full day about the defendants' negligence. It also appears that Gustus's neuropsychology expert, Kaaren Bekken, Ph.D., testified about Nova's cognitive deficits and their cause. According to Bekken's pretrial disclosure, she was expected to testify about numerous neuropsychological deficits that Nova exhibited and to opine that Nova's "history of prolonged craniosynostosis caused the above stated deficits, all of which could have been prevented by earlier intervention."

discussed in Gustus's brief were for the jury to determine. See J. Edmund & Co. v. Rosen, 412 Mass. 572, 576 (1992).

Judgment affirmed.

Order denying motion for new trial affirmed.

By the Court (Massing,
Henry & McDonough, JJ.⁴),



Clerk

Entered: February 13, 2020.

⁴ The panelists are listed in order of seniority.