COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-211

JOHN J. SATIRO, administrator[1]

vs.

DES SENIOR CARE HOLDINGS, LLC[2] & others.[3]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff brought this medical malpractice action as the administrator of the estate of his father, John B. Satiro, who died from complications of an injury to his inner thigh that he sustained while being transferred by a mechanical "Hoyer" lift at a skilled nursing facility operated by defendant 1561

[1] Of the Estate of John B. Satiro.

[2] Doing business as Sweet Brook of Williamstown Rehabilitation and Nursing Center, also known as Sweet Brook Transitional Care and Living Center.

[3] Bruce J. Bedard; 1561 Cold Spring Road Operating Company, LLC; 1561 Cold Spring Road, LLC; Care One, LLC; Senior Care Management LLC; Healthbridge Management LLC; Northern Berkshire Healthcare, Inc.; and Norton and Associates, Inc. As is our custom, we have identified the defendants as they are named in the Amended Complaint. However, the parties later stipulated that 1561 Cold Spring Road, LLC, was the entity doing business as Sweet Brook of Williamstown Rehabilitation Center rather than defendant DES Senior Care Holdings, LLC, as indicated in the Amended Complaint. Defendants Northern Berkshire Healthcare, Inc. and Norton and Associates, Inc. were dismissed with prejudice by agreement and are not parties to this appeal.

Cold Spring Road Operating Company LLC, doing business as Sweet Brook of Williamstown Rehabilitation Center (the facility). The plaintiff alleged that Satiro's death was attributable to the facility's negligence and that defendants DES Senior Care Holdings, LLC; 1561 Cold Spring Road, LLC; CareOne, LLC; Healthbridge Management LLC; and Senior Care Management LLC (the non-facility defendants) were liable for any negligence that occurred within the facility because they were engaged in a joint venture of operating and managing the facility. Following a six-day trial, a Superior Court judge allowed the non-facility defendants' motions for directed verdicts and a jury returned a verdict for the facility. On appeal from the ensuing judgment, the plaintiff challenges several evidentiary rulings, the failure to provide the jury with certain instructions, the allowance of the non-facility defendants' motions for directed verdicts, and the trial judge's decision awarding the defendants' costs.[4] We reverse so much of the judgment that required the plaintiff to pay expert fees and costs but affirm the judgment in all other respects.

[4] In his notice of appeal, the plaintiff also indicated that he was appealing the judge's award of summary judgment to defendant Bruce Bedard. Because the plaintiff has not argued this issue on appeal, it is deemed waived. See Mass. R. A. P. 16 (a) (8), as appearing in 481 Mass. 1628 (2019).

Discussion. 1. Evidentiary rulings. a. Plaintiff's expert witnesses. The plaintiff first challenges the exclusion of certain portions of his experts' testimony. "The decision to exclude expert testimony rests in the broad discretion of the judge and will not be disturbed unless the exercise of that discretion constitutes an abuse of discretion or other error of law." Palandjian v. Foster, 446 Mass. 100, 104 (2006).

The plaintiff's medical causation expert, Dr. Joseph Micca, was not permitted to offer testimony on the proper procedure to operate a Hoyer lift or any opinions as to whether the Hoyer lift used to transport Satiro was defective on the day he was injured. Dr. Micca was an internal medicine physician who had practiced in nursing home settings for over twenty years. Even so, Dr. Micca testified that he had never operated or received training on how to operate a mechanical lift and that his opinions regarding the proper function and operation of a Hoyer lift had been informed by a YouTube video and a Hoyer lift instruction manual. Given Dr. Micca's lack of education, training, and experience with the Hoyer lift, it was not an abuse of discretion or an error of law to preclude him from offering opinions on the operation or functioning of a Hoyer lift. See Simmons v. Yurchak, 28 Mass. App. Ct. 371, 378 (1990) ("A medical expert may testify outside his or her area of expertise so long as the witness has sufficient education,

training, experience and familiarity with the subject matter of the testimony" [quotation and citation omitted]).

There was likewise no abuse of discretion in precluding another of the plaintiff's experts, licensed nursing home administrator Lance Youles, from testifying that the certified nursing assistants (CNAs) who executed Satiro's transfer did so negligently. Youles' report was devoid of any discussion of proper Hoyer lift operation or precisely what the CNAs did wrong during Satiro's transfer. The only discernible bases for Youles' opinion were Youles' speculative beliefs that the facility was "poorly operated," that "it was inevitable that a situation like this would occur," and that the CNAs "unsafely acted at a point to which they could have got help" but failed to do so. Even assuming that that the facility was, in fact, "poorly operated" and that the CNAs had "unsafely acted," there was no evidence that either of these factors caused the injury that led to Satiro's death. See LightLab Imaging, Inc. v. Axsun Techs., Inc., 469 Mass. 181, 191 (2014), quoting Sevigny's Case, 337 Mass. 747, 751 (1958) ("It has long been a part of our common law of evidence that although 'courts are not to determine which side of a . . . dispute is sound where each side is supported by reason and logic[,] . . . an opinion given by an expert will be disregarded where it amounts to no more than mere speculation or a guess from subordinate facts that do not give

adequate support to the conclusion reached'"). See also Kennedy v. U-Haul Co., 360 Mass. 71, 73-74 (1971) ("A mere guess or conjecture by an expert witness in the form of a conclusion from basic facts that do not tend toward that conclusion any more than toward a contrary one has no evidential value"). We discern no error in the exclusion of Youles' testimony that the CNAs acted negligently.

b. Death certificate. Next, the plaintiff claims that the trial judge abused his discretion when he ordered language attributing Satiro's death to an injury resulting from a "Hoyer lift malfunction" and "prolonged Hoyer lift suspension" to be redacted from Satiro's death certificate. Under G. L. c. 46, § 19, "nothing contained in the record of a death which has reference to the question of liability for causing the death shall be admissible in evidence." Here, the statements that the Hoyer lift "malfunctioned" and that Satiro was injured by "prolonged Hoyer lift suspension" expressly supported the plaintiff's theories that Satiro's death was attributable to the facility's negligent operation of the Hoyer lift or a negligent failure to properly inspect or maintain it. Contrast Wadsworth v. Boston Gas Co., 352 Mass. 86, 93 (1967) (statement that death caused by "inhalation of illuminating gas" did not bear on liability in absence of language indicating cause of decedent's

exposure). We discern no error in ordering the redaction of the references to the Hoyer lift.[5]

3. Jury instructions. a. Res ipsa loquitur. The plaintiff's challenge to the trial judge's refusal to provide a jury instruction on res ipsa loquitur is not properly before this court because the plaintiff's trial counsel did not object to the omission of this instruction on the record. "A party must make a proper objection to a jury instruction before the jury retires in order to preserve the issue for appeal. . . . A party who fails to comply with [this] rule . . . forfeits his right to complain on appeal of the giving or omission of an instruction" (quotation and citation omitted). Jarry v. Corsaro, 40 Mass. App. Ct. 601, 603 (1996), citing Abraham v. Woburn, 383 Mass. 724, 732 (1981). See Mass. R. Civ. P. 51 (b), 365 Mass. 816 (1974) ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating

[5] Assuming, arguendo, that G. L. c. 46, § 19 did not render the references to the Hoyer lift inadmissible, we agree with the trial judge's conclusion that the references to the lift were inadmissible hearsay. The plaintiff did not present any evidence to suggest that the medical examiner had first-hand knowledge that a Hoyer lift caused the hematoma on Satiro's thigh that led to his death approximately two weeks later. To the contrary, a pathologist testified that she and the medical examiner "were told" that the bruise on Satiro's leg happened during "an accident involving a Hoyer lift" when they began collecting information about his death.

distinctly the matter to which he objects and the grounds of his objection"). Because the plaintiff's counsel failed to timely object to the trial judge's failure to provide a res ipsa instruction, the plaintiff's claim of error was not preserved for appeal. See Boss v. Leverett, 484 Mass. 553, 562-563 (2020).[6]

b. Consciousness of liability. There was no error in the judge's refusal to instruct the jury that the facility's failure to report Satiro's injury to the Department of Public Health could be considered as evidence of consciousness of guilt or an admission of liability. The plaintiff presented no evidence at trial that the facility had, in fact, failed to report the injury. The judge, therefore, was not required to instruct the jury on this issue.

4. Directed verdict. The plaintiff next challenges the judge's decision to grant directed verdicts to the non-facility defendants. "To constitute a joint venture, some degree of mutual participation in the control or management of the entities amounting to more than being a mere spectator is

[6] Even if this claim had been preserved, we note that the plaintiff was not entitled to an instruction on res ipsa loquitur because the jury could not have concluded from their common knowledge or based on available expert testimony that Satiro's injury "does not normally occur in the absence of negligence." See Edwards v. Boland, 41 Mass. App. Ct. 375, 379-380 (1996).

required." Dakin v. OSI Restaurant Partners, LLC, 100 Mass. App. Ct. 92, 99 (2021), citing Shain Inv. Co. v. Cohen, 15 Mass. App. Ct. 4, 9-10 (1982). No view of the evidence presented in support of the plaintiff's joint venture claim here, which included, inter alia, evidence the defendants shared the same address and similarly described the character of their businesses on their respective annual reports, permitted an inference that the non-facility defendants had a right of common control or management over the care the facility provided to Satiro. See Namundi v. Rocky's Ace Hardware, LLC, 81 Mass. App. Ct. 665, 666 (2012) ("In reviewing a directed verdict for the defendants, we consider all evidence in the light most favorable to the nonmoving party"). At best, the evidence showed that the parties shared a corporate relationship. Standing alone, this was insufficient to establish the existence of a joint venture. See Dakin, supra at 97 (common management and shareholders among related corporate entities insufficient to establish joint venture relationship between corporations). Cf. G. L. c. 156C, § 22 (members of limited liability corporations cannot be held personally liable for corporation's debt "solely by reason of being a member or acting as a manager"). The judge, therefore, did not error in allowing the non-facility defendants' motions for directed verdicts.

5. Costs. Two months after judgment entered on the jury verdict, the defendants moved to recover costs pursuant to Mass. R. Civ. P. 54 (d), as appearing in 382 Mass. 821 (1980). The judge awarded the defendants $7,308.06 for deposition transcripts and $16,742.50 for fees associated with deposing the plaintiff's expert witnesses. The plaintiff avers that the cost award was an abuse of discretion. See Scohlz v. Delp, 473 Mass. 242, 254 (2015).

Rule 54 (d) provides that unless "express provision therefor is made either in a statute . . . or in [the Rules of Civil Procedure], costs shall be allowed as of course to the prevailing party." With respect to costs related to taking depositions, Mass. R. Civ. P. 54 (e), as amended, 382 Mass. 829 (1981), states that an award "shall be subject to the discretion of the court, but in no event shall costs be allowed unless the court finds that the taking of the deposition was reasonably necessary."

Here, the judge found that the majority[7] of the transcript costs requested by the defendants, which related to the depositions of witnesses the plaintiff had either listed in the pretrial memorandum or witness lists before trial, "were

[7] The judge deducted $71.70 from the requested deposition transcript costs that the defendants were charged as a penalty for late payment.

reasonably necessary to the defense of the case and are recoverable." We see no basis for concluding that this portion of the costs awarded to the defendants amounted to an abuse of discretion. See Biewald v. Seven Ten Storage Software, Inc., 94 Mass. App. Ct. 376, 384 (2018).

The amount awarded to the defendants for expert fees stand on different footing. "[I]n Massachusetts, '[o]ur traditional and usual approach to the award of attorney's fees for litigation has been to follow the "American Rule": in the absence of statute, or court rule, we do not allow successful litigants to recover their attorney's fees and expenses.'" Styller v. National Fire & Marine Ins. Co., 95 Mass. App. Ct. 538, 544 (2019), quoting John T. Callahan & Sons, Inc. v. Worcester Ins. Co., 453 Mass. 447, 449 (2009). "The same traditional rule governs expert fees and expenses." Id. Accordingly, "taxable costs do not ordinarily include expert fees and expenses except as nominally allowed, pursuant to G. L. c. 262, § 29."[8] Id. at 544, citing Waldman v. American Honda

[8] Specifically, the statute limits expert witness fees and costs to six dollars a day and ten cents per mile. G. L. c. 262, § 29. See Waldman v. American Honda Motor Co., 413 Mass. 320, 322 (1992), quoting MacNeil Bros. v. Cambridge Sav. Bank, 334 Mass. 360, 363 (1956) ("As a general rule taxable costs are considered full compensation to a prevailing party for the expense of conducting litigation even though such costs are only nominal and wholly inadequate").

Motor Co., 413 Mass. 320, 322 (1992). It was, therefore, error to award the defendants $16,742.50 for expert fees and costs.

So much of the amended final judgment as awarded the defendants $16,742.50 for expert fees and costs is reversed. In all other respects, the judgment is affirmed.

By the Court (Green, C.J., Wolohojian & Henry, JJ.[9]),

Joseph F. Stanton

Clerk

Entered: August 5, 2022.

[9] The panelists are listed in order of seniority.