

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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-834

PAPKEN HARTUNIAN

vs.

MERCY MEDICAL CENTER & others.<sup>1</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Papken Hartunian, brought this action for medical malpractice and related claims against Mercy Medical Center (MMC), a doctor, a nurse, and a physician's assistant, after a hand wound treated at MMC became infected, resulting in pain, suffering, and loss of function. On appeal the plaintiff contends that the defendants' motions for summary judgment were allowed improperly because he had placed material facts in dispute regarding the liability of the individual defendants.<sup>2</sup> We affirm.

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<sup>1</sup> Louis Durkin, Leah H. Skypeck, and Wendy Hogans.

<sup>2</sup> The plaintiff's claims against MMC were dismissed pursuant to Mass. R. Civ. P. 33 (a) (4), as appearing in 436 Mass. 1401 (2002), and a separate judgment entered. The plaintiff filed an appeal from this judgment in January 2017, but he failed to timely enter the appeal in this court in accordance with Mass. R. A. P. 10 (a) (1), as amended, 435 Mass. 1601 (2001). Accordingly, we lack jurisdiction to hear an appeal against MMC.

Background. We summarize the undisputed facts common to all of the defendants, reserving facts pertaining to particular defendants for later discussion. On April 28, 2012, the plaintiff fell, injuring his right hand. The plaintiff sought treatment at MMC's emergency department. Wendy Hogans, a registered nurse, assessed the plaintiff's injuries and treated abrasions on his right knee and left lower leg. She referred the plaintiff to a doctor for the treatment of his hand injury. Leah Skypeck, a student physician assistant, treated and sutured the plaintiff's hand laceration under the supervision of Dr. Louis Durkin. On April 30, 2012, the plaintiff sought further treatment for his right hand at Baystate Medical Center (Baystate), where it was determined that the plaintiff's injury was infected and required surgery.

Discussion. The plaintiff contends that the judge erred in allowing the individual defendants' motions for summary judgment because there were genuine issues of material fact as to their respective liability. "Our review of a motion judge's decision on summary judgment is de novo, because we examine the same record and decide the same questions of law." Williams v.

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We also lack jurisdiction to hear an appeal from the denial of the plaintiff's motion for relief from judgment. No notice of appeal from that order was filed. See Mass. R. Civ. P. 60 (b), 365 Mass. 828 (1974); Chavoor v. Lewis, 383 Mass. 801, 804-805 (1981).

Steward Health Care Sys., LLC, 480 Mass. 286, 290 (2018), quoting Kiribati Seafood Co. v. Dechert, LLP, 478 Mass. 111, 116 (2017). "We view [the facts] in the light most favorable to the nonmoving party, here, the plaintiff[]." Williams, supra at 288.

1. Medical malpractice. a. Dr. Durkin. "To prevail on a claim of medical malpractice, a plaintiff must establish the applicable standard of care and demonstrate both that a defendant [health care provider] breached that standard, and that this breach caused the patient's harm." Zaleskas v. Brigham & Women's Hosp., 97 Mass. App. Ct. 55, 69 (2020), quoting Palandjian v. Foster, 446 Mass. 100, 104 (2006). "It is only in exceptional cases that a jury instructed by common knowledge and experience may without the aid of expert medical opinion determine whether the conduct of a [healthcare provider] toward a patient is violative of the special duty which the law imposes as a consequence of this particular relationship." Forlano v. Hughes, 393 Mass. 502, 507 (1984). See Curreri v. Isihara, 80 Mass. App. Ct. 193, 195 (2011) ("the burden is on the plaintiff to establish a causal connection between the alleged negligence of a defendant and any damages"). While on summary judgment a defendant who is the moving party assumes the burden of proof on all aspects of plaintiff's case, once the defendant provides evidence on each element, the burden shifts

to the plaintiff to place facts in dispute in order to defeat the motion. "[A] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass. R. Civ. P. 56 (c) . . . that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case."

Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

Durkin submitted materials in connection with his motion for summary judgment to show that he provided appropriate medical treatment consistent with the standard of care and that his treatment did not cause the infection. This meant that the plaintiff had the obligation to produce some facts, in the form of admissible evidence at trial, to show that the care provided fell below the standard of care, and that substandard care caused the plaintiff's injuries. See generally Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002); Kourouvacilis, 410 Mass. at 716. However, for reasons discussed more fully below, the plaintiff had no expert. Durkin contends that this was fatal to the plaintiff's negligence claim. We agree. In the absence of an expert opinion on standard of care or causation, the plaintiff failed to create a dispute of material fact, and

Durkin was entitled to summary judgment as a matter of law. See Palandjian, 446 Mass. at 104; Curreri, 80 Mass. App. Ct. at 195.

The plaintiff claims that he was deprived of his expert by erroneous rulings of the motion judge. We review the judge's rulings for an abuse of discretion.<sup>3</sup> The judge initially denied Durkin's motion for summary judgment without prejudice to allow the plaintiff time to file an expert disclosure and to confirm Dr. Edward Mallory would testify at trial. The plaintiff had previously failed to disclose his expert in response to expert interrogatories or at the time of the pretrial conference. He then failed to timely file an expert disclosure when he was given an extension of time to do so. He filed the expert disclosure late, on the day the defendants' motions for summary judgment were served, but without the required certification pursuant to Rule 30B of the Rules of the Superior Court. The judge considered the late-filed expert opinion of Mallory, but warned that she would no longer "indulge the plaintiff in these continuing abuses." She denied the portion of Durkin's motion for summary judgment related to the claim of medical malpractice and set a trial date of March 13, 2019.

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<sup>3</sup> An abuse of discretion occurs when the judge "makes a clear error of judgment in weighing the relevant factors such that the decision falls outside the range of reasonable alternatives" (quotation and citations omitted). Quarterman v. Springfield, 91 Mass. App. Ct. 254, 260 (2017).

On February 6, 2019 the plaintiff filed a motion to continue the trial because his expert was unavailable to testify on the trial date. After additional submissions which the judge requested be filed under oath, the judge found that the motion was filed in bad faith for purposes of delay, that the plaintiff had failed, over a substantial period of time, to pay the expert in a timely manner or otherwise take reasonable steps to secure his presence at trial, and denied the motion. Having reviewed the pleadings, including the history of the expert disclosures and the e-mails between the plaintiff and the expert, we discern no abuse of discretion in the judge's ruling. See Mass. R. Civ. P. 40 (b), 365 Mass. 802 (1974); Alphas Co. v. Kilduff, 72 Mass. App. Ct. 104, 109-111 (2008).

The judge then reconsidered the motion for summary judgment after supplemental briefing. She determined that the plaintiff's original delay in disclosing his medical expert violated Rule 30B of the Rules of the Superior Court, as well as Mass. R. Civ. P. 26 (b) (4), 365 Mass. 772 (1974), and she declined to consider the expert's opinion for that reason. Passing on the decision not to consider Mallory's opinion,<sup>4</sup> by

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<sup>4</sup> The judge found that the disclosure was filed late for purposes of obstructing Durkin in the preparation of his defense. The same opinion had been presented to the medical malpractice tribunal, but because disclosures were significantly delayed, the defendants were not on actual notice that Mallory would be the expert at trial.

the time the judge heard the summary judgment motion for the second time, she had denied the motion to continue and it was clear Mallory would not be appearing at trial. Thus, this is a case where it is indisputably true that there was no reasonable basis to believe that the plaintiff would prove his case at trial. Kourouvacilis, 410 Mass. at 716. The judge did not err in allowing Durkin's motion for summary judgment on the medical malpractice claim.

b. Nurse Hogans. Hogans supported her motion for summary judgment with affidavits and deposition transcripts stating on personal knowledge that she was not permitted, under MMC's policies, to evaluate, clean, suture, or otherwise treat the plaintiff's hand laceration. Hogans did not treat the plaintiff's hand laceration.

The plaintiff nonetheless contends Hogan's should have done more. The plaintiff's expert, Nurse Michelle Myers Glower, offered the opinion that Hogans should have been more proactive and directive with the doctor. Whether the expert's opinion created a dispute of material fact, as it was based on factual assumptions that were in contravention of MMC's policies, poses a question we need not address here.<sup>5</sup> Although the expert opined

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<sup>5</sup> No argument is made that the policies themselves form the basis of a malpractice claim. Compare Goldberg v. Northeastern Univ., 60 Mass. App. Ct. 707, 710 (2004).

on the standard of care, she did not offer an opinion regarding causation. "A plaintiff in a medical malpractice action has the burden of proving that the [nurse's] negligence was the proximate cause of the plaintiff's injuries." Harlow v. Chin, 405 Mass. 697, 702 (1989). Summary judgment was properly granted to Hogans on this count.

c. Student physician's assistant Skypeck. The judge dismissed the plaintiff's claims against Skypeck for lack of an expert opinion as to the duty of care of a student physician's assistant. The expert opinion submitted by the plaintiff in opposition to the motion for summary judgment did not address the applicable standard of care for a student physician's assistant. Nor did it address whether Skypeck's conduct was a contributing cause of the injury. The judge did not err in granting summary judgment to Skypeck on the negligence claim.

2. Lack of informed consent. The plaintiff contends that the judge erred in granting summary judgment as to claims that defendants Durkin and Skypeck violated G. L. c. 111, § 70E, by failing to obtain informed consent to treatment by a student physician's assistant. Because the statutory provision refers only to facilities and physicians, the judge properly allowed Skypeck's motion for summary judgment on this count.

With regard to Durkin, G. L. c. 111, § 70E, provides that "[e]very patient . . . shall be provided by the physician in the

facility the right . . . to refuse to be examined, observed, or treated by students or any other facility staff without jeopardizing access . . . to medical care." The plaintiff contends that the statute imposes a duty on physicians to inform patients that they are going to be treated by a student and that Durkin's alleged failure to do so violated the plaintiff's statutory rights.

Whether the statute imposes a duty on physicians (as opposed to the facility) that is enforceable by a private right of action is undecided. However, even if we were to assume (without deciding) that the statute permits a claim against Durkin, personally, for failure to inform the plaintiff that Skypeck was a student, summary judgment was warranted because without an expert the plaintiff did not place facts in dispute to show that the care provided by Skypeck and Durkin caused the plaintiff's hand wound to become infected. See Aceto v. Dougherty, 415 Mass. 654, 661 (1993) ("in order to recover for a physician's failure to obtain informed consent, the plaintiff must show not only that the physician failed to disclose material information to the patient, but also that the physician's failure . . . is causally related to the patient's injury").

3. Negligent infliction of emotional distress. "'[I]n order to recover for negligently inflicted emotional distress,'

a plaintiff must prove the following: '(1) negligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomatology; and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case.'" Helfman v. Northeastern Univ., 485 Mass. 308, 327 (2020), quoting Payton v. Abbotts Labs, 386 Mass. 540, 557 (1982). For the same reason summary judgment was appropriate on the plaintiff's other negligence claims, the defendants were entitled to summary judgment on this claim as well.

4. Other claims. The plaintiff's due process claims based on decisions associated with the judge's leave of absence, amendments to the tracking orders, and other case management orders are without merit. During the litigation, the judge who was familiar with the case was out of rotation. A docket entry stated that she would hear the case upon her return. This order did not constitute an abuse of discretion or other error of law. See generally Marston v. Orlando, 95 Mass. App. Ct. 526, 532 (2019).

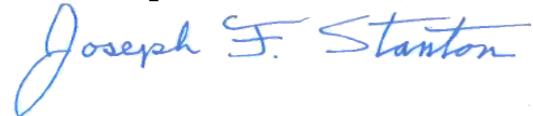
The plaintiff also challenges various rulings with respect to amending the tracking orders. Superior Court Standing Order 1-88 grants discretion to the motion judge to amend the tracking deadlines. The designated judge and a second motion judge allowed motions to amend the tracking order filed by each of the parties at least in part in consideration of the plaintiff's

status as a pro se plaintiff. The judge also permissibly denied the plaintiff's second motion to amend his complaint because it was filed after the tracking order deadline for amendment, and a month before summary judgment motions were due.<sup>6</sup>

Conclusion. For the foregoing reasons, the judge did not err in allowing the individual defendants' motions for summary judgment.

Judgment affirmed.

By the Court (Wolohojian,  
Milkey, & Sullivan, JJ.<sup>7</sup>),



Clerk

Entered: December 21, 2020.

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<sup>6</sup> Other arguments relied on by the plaintiff "but not discussed in this [decision], have not been overlooked. We find nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78, (1954).

<sup>7</sup> The panelists are listed in order of seniority.