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-1635

JOHN ROSSINI, personal representative,[1]

vs.

JGS LIFECARE CORPORATION[2] & another.[3]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following the death of Hilda Rossini (decedent) while she was in the care of the defendant,[4] the plaintiff filed a complaint seeking damages based on claims arising out of alleged medical malpractice. See G. L. c. 231, § 60B. After a medical malpractice tribunal concluded that the plaintiff's offer of proof was insufficient to present a triable claim, the plaintiff filed a surety bond in purported compliance with the requirements of G. L. c. 231, § 60B. Several months later, on August 13, 2018, the Supreme Judicial Court decided Polanco v.

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[1] Of the estate of Hilda Rossini.

[2] Formerly known as Jewish Geriatric Services, Inc., doing business as Jewish Nursing Home of Western Mass.

[3] Udaya B. Jagadeesan.

[4] The plaintiff's complaint originally named a number of defendants, including JGS Lifecare Corporation. Only defendant Jagadeesan remains in the case on appeal.

Sandor, 480 Mass. 1010 (2018), which held that a surety bond in the face amount of the statutory requirement does not satisfy G. L. c. 231, § 60B.[5] See id. at 1012. Thereafter, the defendant moved to strike the filing of the surety bond and to dismiss the case for failure to post the required bond following the medical malpractice tribunal's finding; that motion was allowed, and the Superior Court entered a judgment of dismissal. Following entry of judgment, the plaintiff filed a motion under Mass. R. Civ. P. 60 (b), 365 Mass. 828 (1974), seeking relief from the judgment and an enlargement of time to file a cash bond; that motion was denied. The plaintiff appeals from the judgment of dismissal, the denial of his motion for reconsideration pursuant to Mass. R. Civ. P. 59 (e), 365 Mass. 827 (1974), and the denial of his rule 60 (b) motion. We affirm.

Dismissal of the plaintiff's complaint. There is no merit to the plaintiff's contention that the Superior Court erred in dismissing the plaintiff's complaint for failure to file a bond

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[5] That section provides, in relevant part, that "[i]f a finding is made for the defendant or defendants in the case the plaintiff may pursue the claim through the usual judicial process only upon filing bond in the amount of six thousand dollars in the aggregate secured by cash or its equivalent with the clerk of the court in which the case is pending, payable to the defendant or defendants in the case for costs assessed, including witness and experts fees and attorneys fees if the plaintiff does not prevail in the final judgment" (emphasis added). G. L. c. 231, § 60B.

in accordance with G. L. c. 231, § 60B, based on Polanco. Polanco plainly holds that the plaintiff's surety bond did not satisfy the statutory requirement, see Polanco, 480 Mass. at 1011; the plaintiff accordingly is left to contend that Polanco should be applied only prospectively. But we have consistently held that "[d]ecisions are presumptively given retroactive effect, with prospective effect being given to decisions in 'very limited circumstances.'" Dellorusso v. PNC Bank, N.A., 98 Mass. App. Ct. 84, 86 (2020), quoting Eaton v. Federal Nat'l Mtge. Ass'n, 462 Mass. 569, 588 (2012). Generally, in making a determination whether a decision only applies prospectively, the court "consider[s] the extent to which a decision creates a novel rule, whether retroactive application will serve the purposes of that rule, and whether hardship or inequity would result from retroactive application." Dellorusso, supra, quoting American Int'l Ins. Co. v. Robert Seuffer GMBH & Co., 468 Mass. 109, 120-121, cert. denied, 574 U.S. 1061 (2014). However, where, as here, the decision "does not create a novel rule 'but rather construes a statute, no analysis of retroactive or prospective effect is required because at issue is the meaning of the statute since its enactment.'" Dellorusso, supra, quoting McIntire, petitioner, 458 Mass. 257, 261 (2010), cert. denied, 563 U.S. 1012 (2011). And in those "very limited circumstances . . . that a decision construing a statute should

be given only prospective effect" the court "will typically say so." Dellorusso, supra at 87.

The Supreme Judicial Court's interpretation of G. L. c. 231, §60B, did not create a new rule, but merely interpreted the meaning of the statute since its enactment. Furthermore, the court gave no indication that it intended its holding to apply only prospectively. The Superior Court judge properly dismissed the plaintiff's claims for failure to file a compliant bond within thirty days of the medical malpractice tribunal's finding in favor of the defendant.

There is likewise no merit to the plaintiff's contention that the Superior Court judge erred in dismissing the plaintiff's claims arising out of breach of contract. We have long held that the provisions of G. L. c. 231, § 60B, should be broadly defined to encompass "all treatment-related claims." Little v. Rosenthal, 376 Mass. 573, 576 (1978); Ruggiero v. Giamarco, 73 Mass. App. Ct. 743, 744 (2009) ("The tribunal requirement applies to all treatment related claims, whether in tort, in contract, or under G. L. c. 93A"). Therefore, when evaluating a claim against a health care provider, a judge "must look at the substance of the plaintiff's allegations, rather than the label on the cause of action, to determine if the claim is a malpractice claim." Vacca v. Brigham & Women's Hosp., Inc., 98 Mass. App. Ct. 463, 471 (2020). Therefore, "[a]

plaintiff may not circumvent this statutory scheme by 'restat[ing] a claim, otherwise subject to the medical malpractice act, as [another type of claim].'" Id., quoting Darviris v. Petros, 442 Mass. 274, 283 (2004).

The plaintiff's claim for breach of the covenant of good faith and fair dealing "directly implicat[ed] the professional judgment or competence" of the defendant and clearly suggested that the "breach of contract allegation was based on neglectful care or medical misjudgment" (citation omitted). Koltin v. Beth Israel Deaconess Med. Ctr., 62 Mass. App. Ct. 920, 920 (2004). The substance of the plaintiff's allegations, that the defendant failed to provide adequate treatment because she was pressured by JGS Lifecare Corporation to maximize profits, arose out of medical negligence. The claim was therefore subject to the requirements of G. L. c. 231, § 60B, and was properly dismissed when, as discussed above, the plaintiff failed to file a compliant bond within thirty days after the tribunal made a finding for the defendant. See G. L. c. 231, § 60B.

Denial of the plaintiff's motion for relief from judgment. The Superior Court judge did not abuse his discretion in denying the plaintiff's motion for relief from judgment and request to enlarge time to file a cash bond. See Matter of M.C., 481 Mass. 336, 344 (2019). Relief under Mass. R. Civ. P. 60 (b) (6), is only granted in rare instances when the plaintiff makes a

showing of "extraordinary circumstances." Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29, 33 (1983). See Jones v. Boykan, 464 Mass. 285, 291-292 (2013).[6] Contrary to the plaintiff's contention, it was not impossible to comply with the statutory requirements of G. L. c. 231, § 60B, prior to the holding of Polanco. The plaintiff always could have filed a bond "in the amount of six thousand dollars in the aggregate secured by cash or its equivalent," as required by G. L. c. 231, § 60B. The plaintiff simply elected to proceed by filing a surety bond instead. That choice does not constitute extraordinary circumstances.[7]

Moreover, though the plaintiff made a passing comment at the pretrial conference held on February 7, 2019, to the possibility that he might be allowed to cure his failure to file a proper bond in the event the defendant's motion to dismiss was

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[6] As noted by the Superior Court judge, the plaintiff's request for relief from judgment was largely indistinguishable from his opposition to the defendant's motion to strike the filing of the surety bond and to dismiss. Because, as we discussed, the Superior Court judge did not err in applying the holding of Polanco retroactively and dismissing the complaint, the Superior Court judge did not abuse his discretion in concluding that the same rationale did not warrant relief from judgment.

[7] Furthermore, contrary to the plaintiff's contention, the bond requirement does not affect his substantive rights. Paro v. Longwood Hosp., 373 Mass. 645, 654-655 (1977). While the plaintiff's failure to comply with the statutory requirements resulted in the dismissal of his complaint, "[t]he limited obstruction presented by the medical malpractice tribunal procedure does not impair the substance of the jury trial right." Id. at 655.

allowed, the plaintiff made no attempt to post a cash bond, either at the pretrial conference or upon allowance of the defendant's motion. Instead, on May 17, 2019, the plaintiff moved for reconsideration of the order allowing the motion to dismiss (with no mention of a request to post a compliant bond). It was not until June 18, 2019, more than two months after entry of the judgment of dismissal and nearly a year after the finding of the medical malpractice tribunal, that the plaintiff sought leave to file a late cash bond.[8] We discern no abuse of discretion by the Superior Court judge in denying the plaintiff's belated request for relief.

Decision of the medical malpractice tribunal. Finally, we discern no merit in the plaintiff's contention that the medical malpractice tribunal erred in finding for the defendant. "A plaintiff's offer of proof shall prevail before a medical malpractice tribunal (1) if the defendant is a health care provider as defined in G. L. c. 231, § 60B, . . . '(2) if there is evidence that the [health care provider's] performance did

[8] We note that the plaintiff's request came long after the statutorily required deadline to post the bond had expired; a deadline established by statute, rather than by court rule, ordinarily may not be enlarged by court order, or by leave authorized by court rule. Cf. DeLucia v. Kfoury, 93 Mass. App. Ct. 166, 169 (2018). See Friedman v. Board of Registration in Med., 414 Mass. 663, 665 (1993) ("[A] statutory appeal period . . . cannot be overridden by a contrary rule of court when the manner and time for effective filing of an appeal are delineated in the statute").

not conform to good medical practice, and (3) if damage resulted therefrom.'" Feliciano v. Attanucci, 95 Mass. App. Ct. 34, 37 (2019), quoting Kapp v. Ballantine, 380 Mass. 186, 193 (1980).

We note at the outset that the plaintiff has failed to include in the record appendix the medical records relied on in the expert's report. The plaintiff, as the appealing party, bears the burden of providing us with a sufficient record which shows the alleged error, but, here, it is virtually impossible to assess the adequacy of the medical malpractice tribunal's decision without a complete record. See Allen v. Christian, 408 Mass. 1007, 1007 (1990).

In any event, so much of the plaintiff's offer of proof as appears in our record fails to clear the minimum threshold required to establish a triable claim of malpractice. See St. Germain v. Pfeifer, 418 Mass. 511, 516 (1994). Read in the light most favorable to the plaintiff, the expert report establishes that the defendant placed the decedent on trazodone, an antidepressant medication, without first obtaining informed consent,[9] and that all psychoactive agents, including trazodone,

[9] Again, without a complete record we have no basis to determine the accuracy of the plaintiff's assertion that the defendant did not obtain informed consent. Though the plaintiff contends that the defendant failed to obtain informed consent from either of the decedent's health care proxies, we note that the defendant represented that the medical records indicated that the defendant had conversations with the decedent's health care

have a risk of side effects, such as an increased risk of falls. The expert's report indicates that the decedent suffered falls at the expected time of peak levels of trazodone in her bloodstream. Finally, it notes multiple instances where the defendant failed to adequately document the condition of the decedent, significant medical events, or the medical treatment administered to her. Though the expert's report opines that the failure to obtain informed consent or to maintain proper documentation falls below the expected standard of care, it notably fails to connect these failures to any harm suffered by the decedent. Importantly, the expert's report fails to conclude that the administration of trazodone, itself, fell below the expected standard of care. Generally, the court reviews the evidence in a plaintiff's offer of proof favorably and simply determines whether a "reasonable inference could be drawn in favor of the plaintiff." Glicklich v. Spievack, 16 Mass. App. Ct. 488, 489-490 (1983), quoting Raunela v. Hertz Corp., 361 Mass. 341, 343 (1972). However, evidence that causation is "possible, conceivable or reasonable, without more," will not suffice. Berardi v. Menicks, 340 Mass. 396, 402 (1960). Without offering any indication of how the deviations from the standard of care by the defendant caused the harm

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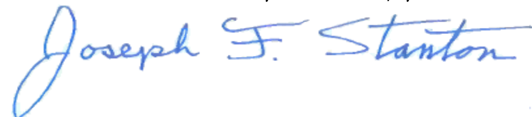
proxies regarding changes to the decedent's medication or medical care.

suffered by the decedent, the plaintiff's offer of proof does not go beyond "pure speculation, conjecture, or assumption" and is not sufficient to "raise a legitimate question of liability appropriate for judicial inquiry. G. L. c. 231, § 60B." Goudreault v. Nine, 87 Mass. App. Ct. 304, 304, 309 (2015), citing Blood v. Lea, 403 Mass. 430, 434 (1988).

Judgment affirmed.

Orders denying motions for reconsideration of judgment and for relief from judgment affirmed.

By the Court (Green, C.J., Shin & Hand, JJ.[10]),



Clerk

Entered: December 15, 2020.

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