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MEDICAL MALPRACTICE

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Courts Clarify Proximate Cause Issues

Most medical malpractice and many products liability cases involve a pre-existing or concurrent cause of harm. Whether the case involves a delay in the treatment of fetal distress, exposure to a toxic chemical, or a defect in a vehicle causing death instead of minor injuries, the plaintiff must prove not only that the defendant is at fault, but also that the negligence or defect was a proximate cause of increased harm.

The proper use of expert testimony is critical in these types of cases, and attorneys can find guidance in three recent opinions: *Anderson v. Picciotti*, 144 N.J. 195 (1996); *Schwarze v. Mulrooney*, 291 N.J. Super. 530 (App. Div. 1996) and *Ginsberg v. St. Michael's Hospital*, 292 N.J. Super. 21 (App. Div. 1996).

In *Anderson*, the Supreme Court explained why the seminal case of *Scafidi v. Seiler*, 119 N.J. 93 (1990) does not apply to all medical malpractice cases, and held that the burden of proof is to be imposed on the party requesting a *Scafidi* charge. Barbara Anderson, an insulin-dependent diabetic, had been cut on the toe while her nails were being clipped, and the wound became infected. Anderson came under the care of Dr. Joseph Picciotti, a podiatrist, who cultured the wound and found a type of bacteria frequently associated with osteomyelitis. The podiatrist then ordered a bone scan which revealed "inflammation consistent with osteomyelitis." *Anderson, supra*, 144 N.J. at 199. A second bone scan revealed "a slightly less certain, but nonetheless likely, indication of bone infection." *Id.* at 200. The podiatrist concluded plaintiff had osteomyelitis and amputated plaintiff's right great toe. However, the pathology report did not confirm osteomyelitis but rather revealed only "chronic inflammation." *Id.* at 213.

Plaintiff's expert testified that the defendant deviated from the standard of care in diagnosing osteomyelitis and amputating the toe without performing a bone biopsy. However, plaintiff's expert admitted that he did not know if plaintiff actually had

osteomyelitis. The defendant's expert testified that it was proper to diagnose osteomyelitis based on the bone scans and clinical symptoms. Significantly, the defendant's expert also admitted that he could not state whether plaintiff had osteomyelitis. Both experts agreed that amputation was the only way to treat osteomyelitis.

Scafidi Charge Sought

Defendant requested a *Scafidi* charge, asserting there was a risk that the toe would have been amputated "in any event" even if a biopsy had been performed. The trial court refused and gave the jury a "but for" proximate cause instruction. The jury found that the podiatrist deviated from the generally accepted standard of care in performing the amputation and that the deviation caused plaintiff's injury.

On appeal, defendant argued that the *Scafidi* charge was appropriate since it was possible plaintiff did in fact have osteomyelitis and would have required the amputation. Plaintiff countered that there was no expert opinion that she actually had osteomyelitis and thus no factual basis to conclude that defendant's negligence combined with a pre-existing condition to cause increased harm. The Appellate Division reversed in an unreported decision, concluding that *Scafidi* did apply since the jury could have concluded that the failure to provide intravenous antibiotics caused plaintiff to lose "a significant chance of achieving a cure without amputation." *Anderson, supra*, 144 N.J. at 204. However, the Supreme Court reinstated the verdict, and in so doing refined the *Scafidi* doctrine.

The *Anderson* Court first reviewed *Evers v. Dollinger*, 95 N.J. 399 (1984), which involved the failure to diagnose cancer. Ms. Evers had noticed a "very tiny lump" in her breast in March, 1977 and was told by the defendant to "stop worrying and go home and relax." *Evers, supra*, 95 N. J. at 402. By October of 1977 the lump had quadrupled in size and plaintiff saw another doctor who ordered a mammogram, which revealed an infiltrat-

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ing ductal carcinoma. Plaintiff's experts offered the opinion that the seven-month delay increased plaintiff's chance of a recurrence. *Evers*, supra, 95 N.J. at 405. However, neither expert could quantify the increased risk. The trial court therefore barred the experts from testifying and dismissed the case. The Supreme Court reversed and instructed:

Plaintiff should be permitted to demonstrate, within a reasonable degree of medical probability, that the seven months delay resulting from defendant's failure to have made an accurate diagnosis and to have rendered proper treatment *increased the risk* of recurrence or of distant spread of plaintiff's cancer, *and that such increased risk was a substantial factor* in producing the condition from which plaintiff currently suffers.

Anderson, supra, 144 N.J. at 205 citing *Evers*, supra, 95 N.J. 417. [Emphasis supplied].

The *Anderson* Court then reviewed *Scafidi*, in which application of the "increased risk/substantial factor" analysis was explained. The *Scafidi* plaintiffs alleged that the defendant's failure to treat Mrs. Scafidi's premature labor caused the premature birth and death of their child. Mrs. Scafidi had called the defendant when she was in her seventh month of pregnancy, complaining of abdominal cramps and bleeding. The defendant did not examine plaintiff but prescribed medication and told her to call back if the cramps intensified. The next day, Mrs. Scafidi was examined by another physician who found that her cervix was partially dilated. Although Mrs. Scafidi was hospitalized and an attempt was made to arrest the premature labor, she delivered a 28-week gestated infant who weighed less than three pounds. The infant died two days later from respiratory failure. Plaintiff's expert testified that the defendant's failure to institute tocolytic measures constituted malpractice which was "directly related to the premature birth." *Scafidi*, supra, 119 N.J. at 98. The *Anderson* Court quoted *Scafidi*'s operative language:

Evidence demonstrating with a reasonable degree of medical probability that negligent treatment *increased the risk of harm posed by a preexistent condition raises a jury question whether the increased risk was a substantial factor in producing the ultimate result.* ... Because this modified standard of proximate causation is limited to that class of cases in which a defendant's negligence combines with a preexistent condition to cause harm — as distinguished from cases in which the deviation alone in the cause of harm — the jury is first asked to verify, as a matter of reasonable medical probability, that the deviation is within the class, i.e., that it increased the risk of harm from the preexistent condition. ... Assuming that the jury determines that the deviation increased the risk of harm from the preexistent condition, we use the "substantial factor" test of causa-

tion because of the inapplicability of "but for" causation to cases where the harm is produced by concurrent causes. ... The "substantial factor" standard requires the jury to determine whether the deviation, in the context of the preexistent condition, was sufficiently significant in relation to the eventual harm to satisfy the requirement of proximate cause.

Anderson, supra, 144 N.J. at 206, citing *Scafidi*, supra, 119 N.J. at 108-109. [Emphasis supplied].

The *Anderson* Court then reinstated the verdict, and in so doing distinguished *Evers* and *Scafidi*, noting that those cases involved the failure to diagnose or treat a condition whereas Ms. Anderson's case involved "the simple question of whether defendant misdiagnosed the inflammatory process in plaintiff's right great toe as osteomyelitis." *Anderson*, supra, 144 N. J. at 207. Since there was no expert proof that amputation was required due to the existence of osteomyelitis, as opposed to the defendant's misdiagnosis, it was inappropriate to give a *Scafidi* charge.

Burden of Proof Issue

The Court also analyzed the burden of proof in increased risk of harm cases, and held that the party requesting the *Scafidi* charge has that burden. In *Scafidi* it was the plaintiff that requested the more flexible "increased risk/substantial factor" charge and therefore the plaintiff had the burden of proving that the increased risk was a substantial factor in causing the ultimate harm. *Anderson*, supra, 144 N.J. at 210. However, where defendant argues that some of the harm is due to the pre-existing condition and seeks apportionment of the damages, "the defendant must bear the burden of establishing the existence and identity of such a condition or disease." *Anderson*, supra, 144 N.J. at 211.

Furthermore, and of equal significance, the defendant must also satisfy, within a reasonable degree of medical probability, "the burden of segregating recoverable damages from those solely incident to the preexisting disease." *Anderson*, supra, 144 N.J. at 212. Since Dr. Picciotti's expert could not state within a reasonable degree of medical probability that plaintiff had osteomyelitis, as a matter of law the defendant could not meet its burden on this issue.

The requirement of expert testimony regarding apportionment of damages was also discussed in two recent Appellate Division cases, *Schwarze v. Mulrooney*, 291 N.J. Super. 530 (App. Div. 1996) and *Ginsberg v. St. Michael's Hospital*, 292 N.J. Super. 21 (App. Div. 1996). In *Schwarze*, supra, plaintiff was injured in a motor vehicle accident when his head was struck by a generator which had been placed in the back of plaintiff's truck. Defendant contended that plaintiff was negligent in failing to secure the generator. Each party produced an expert to testify regarding plaintiff's injuries. However, "neither expert was able to determine the extent to which the severity of plaintiff's injuries was enhanced by reason of the movement of the genera-

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tor." *Schwarze*, *supra*, 291 N.J. Super. at 536.

The trial judge therefore refused to charge the jury regarding plaintiff's negligence and the jury awarded plaintiff \$181,716. The Appellate Division affirmed, holding that the trial court did the right thing for the wrong reason. The Court relied on *Anderson* and *Scafidi* for the conclusion that the defendant has "the ultimate burden of demonstrating which injuries are attributable to which impact." *Schwarze*, *supra*, 291 N.J. Super. at 540. The court concluded that "apportionment of damages requires expert testimony" *Schwarze*, *supra*, 291 N.J. Super. at 541, and since defendant's expert could not apportion the damages, there was no need to submit the question of plaintiff's fault to the jury "because no evidence was presented isolating the second collision injuries he sustained." *Schwarze*, *supra*, 291 N.J. Super. at 542.

Apportionment of Damages

The critical nature of expert testimony regarding the apportionment of damages was further analyzed in *Ginsberg v. St. Michael's Hospital*, 292 N.J. Super. 21 (App. Div. 1996). Mrs. Ginsberg alleged that her 90-year-old husband died as a result of receiving 40 units of insulin instead of the four units which had been ordered. Plaintiff's expert testified that the insulin overdose "caused a chain of events that caused cardiac failure and other organ failures" and that Mr. Ginsberg "would have lived for approximately two more years had the insulin overdose not been given." *Ginsberg*, *supra*, 292 N.J. Super. at 27-28.

In contrast, defendant's expert testified that although the overdose increased the risk that Mr. Ginsberg would die, the overdose was not a substantial factor in Mr. Ginsberg's death. Finally, defendant's expert testified that if the insulin overdose had not been given Mr. Ginsberg would only have lived from two weeks to two months due to various medical conditions. *Ginsberg*, *supra*, 292 N.J. Super. at 28.

The jury concluded that the nurse who administered the insulin was negligent and that Mr. Ginsberg's death would not have occurred when it did but for the negligence of the nurse. Despite having answered the "but for" causation question in favor of the plaintiff, the jury was also asked to decide the "increased risk/substantial factor" questions. The jury decided that although the nurse's negligence increased the risk that Mr. Ginsberg died earlier than he would otherwise have died, the increased risk was not a substantial factor in producing the death of Mr. Ginsberg on a date earlier than otherwise would have occurred. *Ginsberg*, *supra*, 292 N.J. Super. at 27. Therefore, a judgment of no cause of action was entered.

Plaintiff appealed, arguing that the *Scafidi* charge was inappropriate since the issue was not aggravation of a preexisting condition but acceleration of Mr. Ginsberg's death due to the insulin overdose. The Appellate Division noted that *Scafidi* is limited to "that class of cases in which a defendant's negligence combines with the condition to cause harm — as distinguished

from cases in which the deviation alone is the cause of harm." *Ginsberg*, *supra*, 292 N.J. Super. at 30, citing *Scafidi*, *supra*, 119 N.J. at 108-109. The Appellate Division concluded that the *Scafidi* charge was appropriate:

While both plaintiff and defendants conceded that Ginsberg's underlying condition would ultimately cause his death, plaintiff contended that the insulin overdose combined with his underlying condition to accelerate his death. Defendants, on the other hand, contended that, while the overdose increased the risk of premature death, Ginsberg actually died from his underlying congestive heart failure, and that the overdose was not sufficiently significant in the overall picture to require defendants to be held legally accountable for Ginsberg's death. The question for the jury to answer, therefore, was whether the overdose of insulin combined with Ginsberg's pre-existing condition to bring about his premature death, or whether it was his pre-existing condition alone that caused it. The scenario fits squarely within the *Scafidi* construct of increased risk of harm causation. *No doctor testified that the overdose alone would have produced death regardless of Ginsberg's condition. Had that been the testimony, Scafidi would not have been applicable.*"

Ginsberg, *supra*, 292 N.J. Super. at 30. [Emphasis supplied].

Nevertheless, the Appellate Division reversed and remanded for a trial on damages only, holding it was error to require the jury to answer both the "but for" and "substantial factor" causation interrogatories.

As a side note, the court also held that it was reversible error to preclude the treating doctor, who signed the death certificate, from stating his opinion regarding the cause of death merely because he was not named as an expert, citing *Stigliano v. Connaught Labs.*, 140 N.J. 305, 307 (1995). The court noted that exclusion of the treating physician's testimony was "especially unfair and prejudicial in light of the fact that the defense was permitted to use the death certificate ... as support for its position." *Ginsberg*, *supra*, 292 N. J. Super. at 33. For a further discussion of *Stigliano v. Connaught Labs.*, see "Deposing Treating Physicians in Medical Malpractice Cases," 140 N.J.L.J. 990 (June 12, 1995).

Anderson, *Schwarze* and *Ginsberg* provide substantial practical guidance to attorneys handling increased risk of harm cases. Expert witnesses must clearly understand the significance of their testimony regarding the effect of the negligent conduct on the pre-existing conditions and, most importantly, must be able to quantify that damage. The proper application of *Anderson*, *Schwarze* and *Ginsberg* will allow attorneys to use expert testimony to maximum advantage, and consistent with the goal that "a tortfeasor should be charged only with the value of the interest that he [or she] destroyed." *Anderson*, *supra*, 144 N.J. at 207. ■