Not Reported in A.2d, 2007 WL 2126650 (N.J.Super.A.D.)
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Mia DIDIO, Plaintiff-Appellant,
v.
Mary Lou MONASTERIO, M.D., Defendant-Respondent,
and
21st Century Dermatology and Marcy Goldstein, M.D., Defendants.
Argued May 16, 2007.
Decided July 26, 2007.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4519-03.
Adam M. Slater argued the cause for appellant (Mazie Slater Katz & Freeman, attorneys; Mr. Slater and Bruce H. Nagel, on the brief).

James B. Sharp argued the cause for respondent (Sharp & Brown, attorneys; Mr. Sharp, of counsel; Arleen G. Richards, on the brief).

Before Judges WEFING, PARKER and C.S. FISHER.

PER CURIAM.

*1 Plaintiff Mia Didio appeals from a judgment entered on December 23, 2005 after a jury found no cause for action on her medical malpractice complaint. We affirm.

I

Plaintiff had a history of cancer. At age two she had a tumor removed from one side of her brain. In her mid-twenties, two more tumors were removed from the other side of her brain. Notwithstanding the brain tumors and the difficulties associated with them, plaintiff completed high school and one year of college and then worked at daycare centers. She was married at age twenty-four. Her first child was born in 1997. On March 20, 2000, her second child was delivered by defendant Mary Lou Monasterio, M.D ., a gynecologist/obstetrician.

After her second child was born, plaintiff noticed a discharge crusting on her right nipple. On April 20, 2000, a month after giving birth, plaintiff saw defendant for her post-partum examination. Plaintiff testified that she told defendant during that visit about oozing from her right nipple and that defendant knew she was not breastfeeding. Plaintiff stated that after defendant looked at her nipple and performed a "full body exam," defendant told plaintiff that it was probably just milk and not to worry about it. Defendant's records from that office visit indicate that the condition of plaintiff's breasts was "negative." Defendant testified that she would have written down any problems that plaintiff had mentioned. During the post-partum visit, defendant performed a breast exam and made a note that her findings were negative, meaning that there were no palpable lumps, induration (hardening), or abnormal nipple discharge.

Plaintiff saw her family doctor seven times during 2000 and four times during 2001 for headaches and sore throats. She never mentioned the nipple discharge to him. Plaintiff explained that she did not raise the issue with her family doctor because "I have a gynecologist for that." Plaintiff also saw Dr. Carol Glaubiger, a specialist in internal medicine, who referred her to a dermatologist for the nipple discharge.

On October 19, 2001, plaintiff saw Dr. Sang Hui Kim, a Board Certified Dermatologist, who practiced with 21st Century Dermatology. Plaintiff test-

ified that she asked Dr. Kim to do a biopsy, but Dr. Kim diagnosed eczema and prescribed a cream.

Dr. Kim testified that her practice is to take a detailed history from new patients, ask the patient the reason for the visit and offer a full body skin examination for any abnormalities. Dr. Kim's notes indicated that plaintiff complained about a spot on her right temple that had been present for a long time and a spot behind her right ear but never mentioned her breasts or any other complaints. Dr. Kim testified that she would have written down any complaints and positive findings.

Plaintiff next visited defendant for her annual examination on November 5, 2001. Plaintiff testified that she told defendant her nipple had continued to ooze since the birth of her second child, that it was getting worse and that it had started to crust. She stated that defendant looked at her nipple and told her that the discharge was probably milk and not a cause for worry. Plaintiff asked defendant why the condition did not heal and requested a biopsy and a mammogram, but defendant thought there was no need for further testing and that plaintiff was too young for a mammogram. Defendant's notes from that visit stated that plaintiff's breasts were "negative for lump and abnormal discharge" and had "no skin induration." Defendant maintained that the absence of notation in her records regarding plaintiff's breast indicated that plaintiff did not have any complaints.

***2** A few weeks after her annual visit, plaintiff returned to defendant on November 29, 2001 because of her concern about the breast. Plaintiff testified that she again requested a mammogram, but defendant declined to order it and told plaintiff there was no cause for worry. Defendant's notes for this visit indicated that plaintiff wanted to show her "something in [the] nipple" and that defendant found a cracked secretion but no bleeding.

In her physical examination of plaintiff's breast, defendant found no lump or induration. Defendant testified that she specifically looked for a lump because she thought lumps might be a source of the secretion. She was unable to express a secretion from plaintiff's breast. Defendant told plaintiff to return in six months and scheduled an appointment for May 23, 2002. Defendant advised plaintiff to return sooner if the condition persisted or worsened. There was no indication in defendant's records as to the length of time plaintiff experienced the condition. Defendant added that she would have written down any significant findings like scaling, reddening of the areola, or a large amount of crusting, but not insignificant findings like the "very tiny" quantity of crusting that plaintiff presented or a color of discharge that did not indicate a potentially serious problem. If defendant had seen any redness or signs of inflammation, she would have prescribed a topical treatment and referred plaintiff to a dermatologist.

On January 22, 2002, plaintiff saw Dr. Goldstein, another dermatologist at 21st Century Dermatology. Dr. Goldstein's records indicate that plaintiff's main complaint was that two of her fingers were "opening" and bleeding. Plaintiff also expressed concern that her right nipple had been "opening" and oozing for six months. Dr. Goldstein found yellowish crusting and debris within an "area of yellowish oozing." She prescribed a topical antibiotic and cortisone cream for the nipple and made a note to consider a biopsy in the future if the treatments did not work.

Plaintiff did not see defendant for the scheduled May 23, 2002 appointment. Instead, on June 5, 2002, plaintiff saw Dr. Goldstein again. Dr. Goldstein's records indicated that plaintiff said her right nipple "looks better than [the] last visit" and the doctor agreed because the nipple was only slightly crusted and oozing serous fluid, a "sort of clear to yellowish sticky fluid." Plaintiff's testimony was unclear as to whether her nipple was bleeding on that day. Dr. Goldstein was still unsure whether plaintiff's condition was dermatitis or eczema but the failure of plaintiff's condition to respond completely to the topical treatments and the presence of

"firm nodules" in plaintiff's breast prompted Dr. Goldstein to refer plaintiff to a breast surgeon.

On June 5, 2002, the date of plaintiff's visit, Dr. Goldstein wrote to Dr. Glaubiger, noting that plaintiff had a draining and crusted right nipple and that plaintiff had reported the condition persisting for approximately two years. Although the condition might be eczematous, Dr. Goldstein suggested having a breast surgeon evaluate whether a biopsy was necessary. When Dr. Glaubiger received Dr. Goldstein's letter, she referred plaintiff for a mammogram.

*3 On June 6, 2002, plaintiff completed a form at Hackensack University Medical Center on which she checked both bloody discharge and non-bloody discharge for the right breast and wrote that her right nipple was crusty and sore.

On June 7, 2002, plaintiff had a mammogram, which showed a "spiculated mass" with associated calcifications in one quadrant of the breast, plus a nearby cluster of calcifications in an area of asymmetric density near the nipple. A sonogram identified six suspicious lesions.

A radiologist reported the findings to Dr. Deborah Capko, a breast surgeon who performed fine-needle aspirations of the largest lesion and the lesion in the retroareolar lesion on the same date. Dr. Capko examined plaintiff before performing the aspirations and found excoriation and "drainage" from the right nipple, but no palpable masses, nipple "discharge," skin change or adenopathy (swelling of the lymph glands). Dr. Capko noted that plaintiff reported nipple discharge and a scaly patch that had not responded to topical treatment for approximately one year.

The preliminary findings from the aspirations were positive and highly suggestive of malignancy. The radiologist recommended a mastectomy. Dr. Capko diagnosed plaintiff with "high grade ductal carcinoma." The cytology reports and surgical pathology report indicated that the aspirated lesions were invasive carcinomas and that the largest was "nuclear grade 3  ."

On June 20, 2002, plaintiff had a radiological examination that indicated "borderline enlarged right axillary lymph nodes," which led the radiologist to conclude that he "cannot entirely exclude local lymph node involvement."

On July 2, 2002, Dr. Barry Sussman, a specialist in breast cancer surgery, performed a mastectomy on plaintiff's right breast. He also removed the sentinel lymph node and, after a biopsy of the sentinel node was positive, he removed additional lymph nodes from the same region. A plastic surgeon then performed a breast reconstruction. Plaintiff received radiation and chemotherapy. In November 2003, plaintiff underwent a revision of the breast reconstruction and reduction of the left breast to establish symmetry.

Dr. Alan Krutchik, a board certified oncologist, testified for plaintiff. Dr. Krutchik described Paget's Disease as a disease of the nipple or the areola, or both, that resembles crusting with "a redness which may mimic ... eczema " and sometimes there is a yellow or clear discharge, which might become bloody. The symptoms of Paget's Disease, however, may vary. In Dr. Krutchik's opinion, Paget's Disease is "almost always associated with" breast cancer and typically presents in those with intraductal carcinoma or ductal carcinoma, which are predominant forms of breast cancer. In his opinion, if the cancer had not spread to the lymph nodes, the localization of the tumors in one portion of the breast would have made them "highly amenable" to removal by lumpectomy. He further opined that, if plaintiff had Paget's Disease in April 2000 consistent with the symptoms she reported, she would have had the calcifications that would have appeared in a mammogram in November or early December 2001. A mammogram at that point would have detected the breast cancer when it was still localized in one region and amenable to lumpectomy, according to Dr. Krutchik.

***4** Dr. Richard Luciani, a board certified obstetrician/gynecologist, also testified as an expert on plaintiff's behalf. Dr. Luciani testified that any non-milk discharge would represent an abnormality even without the presence of blood. In his view, the standard of care required a gynecologist to rule out the worst possibility, which for a nipple discharge would be a malignancy. He also described Paget's Disease as "very often" looking like "a little eczema " and "[s]ometimes very red and irritated." In Dr. Luciani's opinion, defendant deviated from the standard of care by assuming that a yellowish discharge and crusting were negative findings. He opined that defendant should have referred plaintiff to a breast specialist for a second opinion if the topical cream did not clear up the condition in one or two months.

Dr. Richard Creech, a board certified oncologist, a specialist in breast cancer and board certified in hematology, testified as defendant's oncology expert. In his opinion, plaintiff had Paget's Disease and an underlying cancer that migrated to the nipple. Dr. Creech described Paget's Disease as an irregularity in the nipple itself with the discharge being a minor aspect. Paget's Disease reflected either a ductal carcinoma in situ located solely within the nipple, or an underlying cancer in the breast that migrates up and involves the nipple. Dr. Creech did not believe that an accurate diagnosis in October 2001 would have permitted plaintiff to be treated by lumpectomy rather than mastectomy. All of the indications were that plaintiff already had multiple tumors by October 2001 and, when a patient has multiple tumors, there is a risk that lumpectomy and radiation will miss additional tumors elsewhere in the breast, which could develop and then require a mastectomy at a later date. In his opinion, only a solitary tumor may be treated by lumpectomy. Subsequent or multiple concurrent tumors in the same breast must be treated by mastectomy. Dr. Creech added that plaintiff would still have needed chemotherapy if she had been diagnosed in October 2001 and would have needed radiation therapy as long as three or more lymph nodes tested positive for cancer.

Dr. Daniel Small, a board certified obstetrician/gynecologist and a member of the medical advisory panel for the New Jersey Board of Medical Examiners, testified for defendant as an expert in gynecology. He stated that Paget's Disease is a skin condition that can appear anywhere on the body and that it is often, but not necessarily, associated with an underlying cancer. When Paget's Disease appears on the nipple, it is "generally a raised[,] hard [,] red[,] angry looking spot" that is "clearly a skin abnormality." A "raised thickened area" on the nipple would be a skin abnormality in itself, and "it can crack or ooze a little bit" of yellow discharge like a patch of eczema. That discharge, however, would be an exudate rather than a nipple secretion. Dr. Small called Paget's Disease "very rare" in a gynecology practice, whereas thousands of patients have eczema, mastitis, a yeast infection "or any one of a number of other things on the nipple." Dr. Small assumed plaintiff's version of the facts were true and opined that defendant's treatment of plaintiff on November 29, 2001 satisfied the standard of care for a gynecologist, and that defendant did not deviate from that standard by failing to diagnose Paget's Disease. He noted that some women continue to leak a little milk eighteen months after giving birth so that a period of observation in this case was "totally acceptable."

***5** In this appeal, plaintiff argues:

POINT ONE

THE TRIAL JUDGE ERRED BY NOT PROPERLY INSTRUCTING THE JURY ON THE GARDNER V. PAWLIW PORTION OF MODEL CHARGE 5.36(E)

POINT TWO

THE TRIAL COURT ERRED BY FAILING TO DIRECT A VERDICT FOR PLAINTIFF ON THE INCREASED RISK OF HARM RESULTING FROM THE DEFENDANT'S NEGLI-

GENCE AND FAILING TO STRUCTURE THE VERDICT SHEET ACCORDINGLY

POINT THREE

THE TRIAL [COURT] SHOULD HAVE GRANTED A DIRECTED VERDICT PURSUANT TO VERDICCIO V. RICCA [FN1]

FN1. *Verdicchio v. Ricca,* 179 *N.J.* 1 (2004).

POINT FOUR

THE TRIAL JUDGE ERRED BY FAILING TO ADEQUATELY INSTRUCT THE JURY NOT TO BLAME THE PLAINTIFF

POINT FIVE

THE TRIAL COURT ERRED BY ALLOWING THE DEFENSE TO USE THE FAMILY PHYSICIAN'S RECORDS TO DISPROVE THE BREAST COMPLAINTS

POINT SIX

THE DEFENSE EXPERT ONCOLOGIST DR. CREECH SHOULD NOT HAVE BEEN PERMITTED TO OFFER NET OPINIONS REGARDING THE STATUS AND PROGRESSION OF THE CANCER

POINT SEVEN

DR. CREECH'S TESTIMONY THAT THE RADIATION ONCOLOGIST WOULD NOT HAVE AGREED TO TREAT THE PLAINTIFF IF A LUMPECTOMY WERE PERFORMED SHOULD HAVE BEEN BARRED

POINT EIGHT

THE TRIAL JUDGE ERRED BY FAILING TO ASK WHICH JURORS WERE IN FAVOR OF CAPS ON DAMAGES AND TO EXCUSE THOSE JURORS

II

Plaintiff first argues that the trial court erred in denying her request for a jury instruction on the issue of whether defendant's failure to perform or order diagnostic tests or to refer her to a breast specialist increased her risk of harm. She contends that such an instruction is required whenever a plaintiff presents legally sufficient evidence of symptoms that warranted testing.

The Model Jury Charge on increased risk of injury from a pre-existing condition due to medical negligence [FN2] addresses the required elements of a claim for negligent delay in diagnosis that increases the risk of harm from the plaintiff's underlying condition. It includes an instruction for cases "where the allegation is that the failure to perform a diagnostic test increased the risk of harm:"

FN2. *Model Jury Charge (Civil),* 5.36E, "Pre-existing Condition-Increased Risk/ Loss of Chance-Proximate Cause" (2002).

> If you determine that the defendant was negligent in not having a diagnostic test performed, in this case [here indicate the test(s)], but it is unknown whether performing the test would have helped to diagnose or treat a preexistent condition, the plaintiff does not have to prove that the test would have resulted in avoiding the harm. In such cases the plaintiff must merely demonstrate that the failure to give the test increased the risk of harm from the preexistent condition. A plaintiff may demonstrate an increased risk of harm even if such tests are helpful in a small proportion of cases.
>
> [*Model Jury Charge (Civil), supra,* 5.36E.]

Plaintiff requested a charge using the exact language in the model charge naming the tests as "a biopsy, fine needle aspiration, or mammogram." The trial court found that plaintiff's claim was for failure to diagnose, not failure to test, and denied the request.

The court instructed the jury that plaintiff alleged that defendant's care "was not consistent with the accepted standards of medical practice," and that "as a result there was a delay in diagnosing breast cancer " that harmed plaintiff. The court then gave the instruction in the model charge, except for failure to test.

***6** We must consider the jury charge as a whole. *State v. Marshall,* 123 *N.J.* 1, 135-36 (1991), *cert. denied,* 507 *U.S.* 929, 113 *S.Ct.* 1306, 122 *L. Ed.*2d 694 (1993). "[S]ections of a jury charge cannot be read in isolation." *Mohr v. B.F. Goodrich Rubber Co.,* 147 *N.J.Super.* 279, 283 (App.Div.), *certif. denied,* 74 *N.J.* 281 (1977). The standard is whether the trial court gave "a comprehensible explanation of the questions that the jury must determine," covering all "fundamental matters" at issue. *State v. Green,* 86 *N.J.* 281, 287-89 (1981). If the charge as a whole meets that standard, and there are no other errors, the verdict must be affirmed. *State v. Ramseur,* 106 *N.J.* 123, 280 (1987). There is a general presumption that juries understand and follow instructions. *State v. Loftin,* 146 *N.J.* 295, 390 (1996); *State v. Manley,* 54 *N.J.* 259, 271 (1969).

In *Gardner v. Pawliw,* 150 *N.J.* 359, 363 (1997), the Supreme Court held that the trial court erroneously required plaintiffs to show as a matter of reasonable medical probability that the particular tests named by their experts would have revealed the patient's pre-existing condition. Rather, the trial court should only have required the plaintiffs to prove that the failure to perform those tests "increased the risk that the [underlying] condition would not be detected, treated or corrected and ... that increased risk had been a substantial factor in causing" the harm the plaintiff ultimately sustained. *Id.* at 388-89. *Gardner* distinguished between failure to test and failure to diagnose:

> When the prevailing standard of care indicates that a diagnostic test should be performed and that it is a deviation not to perform it, but it is unknown whether performing the test would have helped to diagnose or treat a preexistent condition, the first prong of *Scafidi [v. Seiler,* 119 *N.J.* 93, 108 (1990),] does not require that the plaintiff demonstrate a reasonable medical probability that the test would have resulted in avoiding the harm. Rather, the plaintiff must demonstrate to a reasonable degree of medical probability that the failure to give the test increased the risk of harm from the preexistent condition.
>
> [*Id.* at 387.]

Plaintiff does not distinguish between failure to test and failure to diagnose in arguing that the trial judge was required to read the *Gardner* portion of Model Charge 5.36E. If we accepted plaintiff's reading of *Gardner,* there would be no such distinction.

Here, Dr. Krutchik testified that a patient with Paget's Disease in her breast would most likely have an underlying cancer with calcifications that a mammogram would disclose. He did not offer any opinion, however, about whether defendant had deviated from the standard of care by failing to diagnose Paget's Disease, by failing to order a mammogram or by failing to refer plaintiff to a breast specialist. Dr. Luciani opined that defendant deviated in failing to diagnose the possibility of Paget's Disease, but that defendant was only required to continue observing the condition at that point. Neither Dr. Krutchik nor Dr. Luciani indicated that a biopsy or fine-needle aspiration test should be ordered by a gynecologist rather than a breast surgeon. Accordingly, we find no error in the trial court's rejection of plaintiff's requested charge.

III

***7** Plaintiff next argues that the trial court erred by refusing to direct a verdict for plaintiff on increased risk of harm resulting from defendant's negligence.

Motions for judgment, whether made pursuant to *R.* 4:37-2(b) at the close of the plaintiff's case, *R.* 4:40-1 at the close of evidence and styled as a motion for directed verdict, or *R.* 4:40-2(b) after the

verdict, are "governed by the same evidential standard:"

> If, accepting as true all the evidence which supports the position of the party defending against the motion and according [her] the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied.
>
> [*Verdicchio, supra,* 179 *N.J.* at 30 (quoting *Estate of Roach v. TRW, Inc.,* 164 *N.J.* 598, 612 (2000)).]

Defendant's expert, Dr. Creech, testified that if plaintiff had Paget's Disease in April 2000, as she alleged, then that fact, in conjunction with the typical rates of progression for that disease and for breast cancer, meant that by October or November 2001, she would have required a mastectomy, radiation therapy and chemotherapy. In his opinion, the delayed diagnosis did not significantly increase plaintiff's risk because the fact that she was still cancer-free at the time of trial, indicated a prognosis similar to that of patients with less aggressive tumors and no positive lymph nodes. Dr. Creech's testimony raised sufficient factual questions for the jury to determine whether the growth of a tumor and increased risk resulting from a delayed diagnosis increased the ultimate risk of harm to plaintiff. *Evers v. Dollinger,* 95 *N.J* . 399, 408, 409 n. 4 (1984). Accordingly, we find no error in the trial court's denial of plaintiff's motion for a directed verdict on the increased risk of harm.

Plaintiff claims that the trial court erred in failing to direct the jury to award her damages without apportionment. Given our decision, this issue is moot.

IV

Plaintiff contends that the trial court erred in failing to adequately instruct the jury not to impute negligence to her. She maintains that defendant's opening argument left the jury with a perception that she had a duty to visit defendant earlier than her scheduled annual checkup in November 2001. She argues that a stronger jury charge was necessary to counter that suggestion. Plaintiff requested the following charge:

> The plaintiff Mia Didio is not claimed to have been negligent in any way in this case and cannot be found negligent or that she caused or contributed to her injuries. Any evidence that you saw or heard that suggested that the plaintiff was negligent or at fault for her injuries cannot be considered for that purpose.

The trial court included the first part of the first sentence of the request and determined that it would be sufficient to keep the jury from considering whether plaintiff had been negligent. The judge indicated that further comment would only serve to highlight the very inferences about plaintiff's conduct that she wanted to avoid. The trial court instructed the jury "that in this case plaintiff Mia Didio is not claimed to have been negligent in any way ." After the charge was read to the jury, plaintiff objected to the omission of the remaining language in her requested charge. The court declined to give a supplemental charge because it would improperly highlight the notion of plaintiff's negligence.

***8** In *Hofstrom v. Share,* 295 *N.J.Super.* 186, 192 (App.Div.1996), *certif. denied,* 148 *N.J.* 462 (1997) , a medical malpractice case, the defendant emphasized throughout the trial that the plaintiff failed to follow his instructions. The plaintiff requested a charge explaining that the absence of evidence that her conduct "caused any damages" required the jury not to consider it "on any issue of liability, proximate cause or damages." *Ibid.* The court denied the request on the ground that the model charge already served that purpose by omitting " 'any indication at all that they should consider the negligence of the plaintiff.' " The court considered the model charge adequate to convey that plaintiff's negligence was " 'not in this case.' " *Ibid.*

Here, there was no allegation of contributory or

comparative negligence and the jury was plainly instructed to that effect. Plaintiff's credibility in claiming that she first complained about her breast to defendant in April 2000, rather than in November 2001, was a legitimate factual dispute, and the absence of any notation in her family doctor's records indicating that she complained about her breast in 2000 or 2001 was relevant to that dispute. Plaintiff explained why she had not mentioned her breast to her family doctor and her expert, Dr. Luciani, supported her testimony. The jury had the opportunity to weigh all of that evidence.

Juries are presumed to understand and follow the court's instructions. *Loftin, supra,* 146 *N.J.* at 390; *Manley, supra,* 54 *N.J.* at 271. Plaintiff's only basis for suspecting that the jury did not understand this instruction was a juror's question to plaintiff's mother about why plaintiff did not seek additional medical options. The juror's question preceded the instruction, however, and does not raise a question as to the jury's understanding and following the charge as a whole.

V

Plaintiff maintains that the trial court erred in allowing defendant to reference plaintiff's family doctor's records for 2000 and 2001 to show the absence of any note indicating that plaintiff complained about her breast during 2000 and 2001. She argues that defendant failed to establish a foundation that the family doctor would have noted the breast problem if she had mentioned it because she had a gynecologist who dealt with those issues.

Relevant evidence is "evidence having a tendency in reason to prove or disprove" a material fact. *N.J.R.E.* 401. The inquiry "focuses upon 'the logical connection between the proffered evidence and a fact in issue.' " *Verdicchio, supra,* 179 *N.J.* at 33 (quoting *State v. Hutchins,* 241 *N.J.Super.* 353, 358 (App.Div.1990)). Relevant evidence is usually admissible unless some exception applies, *N.J.R.E.* 402. A trial court's determination of whether evidence is relevant is discretionary. *Wymbs v. Twp. of Wayne,* 163 *N.J.* 523, 534 (2000); *Green v.. N.J. Mfrs. Ins. Co.,* 160 *N.J.* 480, 492 (1999).

***9** As we discussed previously, plaintiff's family doctor's medical records were relevant to the issues presented to the jury and testimony regarding those records was properly admitted.

VI

Plaintiff claims that the trial court erred in letting Dr. Creech give a net opinion that she had multiple carcinomas and multiple positive lymph nodes as of November 2001 and, therefore, would have needed the same treatment if cancer had been diagnosed at that time, rather than seven months later. Plaintiff moved to preclude that portion of Dr. Creech's testimony based on his admission during deposition that he had no opinion about when multiple carcinomas developed or when the cancer spread to the first lymph node. Defendant responded that Dr. Creech would testify only that he could not give exact times for those developments. The trial court denied plaintiff's motion on the ground that such an alleged defect in an expert's opinion was for plaintiff to address on cross-examination.

Plaintiff further argues that the trial court erred by allowing Dr. Creech to testify respecting his opinion about the practices of radiation oncologists, which was not set forth in his expert reports. She maintains that she was prejudiced because she lacked notice of this testimony, her experts had already testified and it was too late to find a new expert.

The decision to admit or exclude expert testimony lies in the discretion of the trial court. *State v. Summers,* 176 *N.J.* 306, 312 (2003); *B.F. Goodrich Co. v. Oldmans Twp.,* 323 *N.J.Super.* 550, 551 (App.Div.1999). We agree with the trial court's decision to admit Dr. Creech's testimony.

After Dr. Creech testified that he believed no radiation therapist would recommend a lumpectomy

rather than a mastectomy for a patient with more than one tumor in her breast, plaintiff objected on the ground that the testimony went beyond his report. We find no abuse of discretion in the trial court's decision to admit Dr. Creech's testimony. *See Summers, supra,* 176 *N.J.* at 312; *B.F. Goodrich, supra,* 323 *N.J.Super.* at 551.

VII

Finally, plaintiff argues that in conducting voir dire of prospective jurors, the trial court erred in failing to ask prospective jurors if they favored damage caps. Plaintiff maintains that jurors who favored such caps should have been excused. Given our decision in this case, that issue is moot.

Affirmed.

N.J.Super.A.D.,2007.
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