

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2365

September Term, 2014

CELESTE PUPPOLO

v.

VADIVELU SIVARAMAN

Eyler, Deborah S.,
Kehoe,
Bair, Gary E.,
(Specially Assigned),
JJ.

Opinion by Kehoe, J.

Filed: December 3, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In this appeal, we consider whether the Circuit Court for Baltimore City, the Honorable Emanuel Brown presiding, erred when it granted Vadivelu Sivaraman’s motion for summary judgment in a medical malpractice and wrongful death action brought against him by Celeste A. Puppolo, individually and as Personal Representative of the Estate of Nancy V. Puppolo, decedent, and David G. Puppolo, a wrongful death beneficiary.¹ Appellants present one issue, which we have divided and reworded for purposes of analytical clarity:

1. Did the circuit court err in granting Dr. Sivaraman’s motion for summary judgment in light of the record that was before the court at that time?
2. Did the circuit court abuse its discretion in denying appellants’ motion to alter or amend the judgment?

We will affirm the circuit court’s judgment.

Background

Vadivelu Sivaraman, M.D., M.B.B.S., is a board-certified anesthesiologist and critical care physician employed by the University of Maryland Medical Center as a staff physician in its surgical intensive care unit (SICU). The decedent, Nancy Puppolo,² was a patient in the SICU from March 4, 2008, until her death on December 23, 2008. Dr.

¹In his brief, Dr. Sivaraman states that David Puppolo is a use plaintiff only and has not participated in this case. Appellants do not contest this assertion.

²In their briefs and, before the circuit court, the parties referred to the decedent as “Mrs. Puppolo.” We will do so as well.

Sivaraman was one of many physicians who cared for Mrs. Puppolo during the months that she was in the SICU.

Appellants assert that Mrs. Puppolo died as a result of the administration of heparin, an anticoagulant used to prevent blood clotting during dialysis. Heparin has a side effect of driving down blood platelet levels and is normally not administered when the patient's platelet level falls below 50, that is, 50,000 platelets per microliter of blood. When heparin is given to a patient whose platelet level is below 50, a condition called "heparin-induced thrombocytopenia" ("HIT") can occur. HIT interferes with the blood's ability to clot and is a very serious, sometimes fatal, condition. The protocols for administering heparin require that the patient's platelet levels be monitored and that heparin be discontinued if platelet levels drop below 50.

On December 22, 2008, Dr. Sivaraman was on duty as the attending physician in the SICU. On that day, although her platelet level was at 1, Mrs. Puppolo received two doses of heparin. Appellants assert that Mrs. Puppolo developed HIT as a result and essentially bled to death on December 23, 2008. They filed a wrongful death action against Dr. Sivaraman, asserting that he administered the heparin to Mrs. Puppolo, or allowed it to be administered to her, and, in so doing, breached his duty of care to her.

During discovery, Dr. Sivaraman's counsel deposed one of appellants' breach of duty experts, Arthur Atchabahian, M.D. Dr. Atchabahian testified that Dr. Sivaraman could have breached his duty of care in one of two ways:

Q. And how is it that Dr. Sivaraman violated the standard of care?

A. He administered heparin during hemodialysis.

Q. Is that the only way in which Dr. Sivaraman breached the standard of care?

A. Yes.

Q. So if Dr. Sivaraman had not administered heparin during hemodialysis, you would not have any criticisms of his care; is that correct?

A. That's correct.

Q. Is it your opinion that the administration of heparin during hemodialysis was the cause of Mrs. Puppolo's death?

A. Yes.

Dr. Sivaraman's counsel revisited the standard of care question later in the deposition.

Q: Well, if Dr. Sivaraman is not the one that wrote the order for heparin, you would agree he did not violate the standard of care?

A. Correct. Whoever wrote that order violated the standard of care.

* * *

Q. All right. So just so I'm clear, the only criticism that you have in your report and your certificate of Dr. Sivaraman is that he ordered heparin for Mrs. Puppolo, correct?

A. Correct.

Q. And if he had not been the one to order the heparin for Mrs. Puppolo, then you would not have any other criticisms of his care?

A. Well, if he — if he's the attending, coordinating the patient's care, I think he should be — he typically is responsible for — for the orders that are placed.

I don't know who would have placed this order. If it's a resident that's taking care of the patient under his supervision, then I would say the attending physician is ultimately responsible. If it's another attending physician, then I would say, yes, that person is responsible and not Dr. Sivaraman.

Q. [W]hat's the basis for your opinion that the attending physician is ultimately responsible?

A. When residents take care of patients under supervision, the attending is responsible unless the residents do something that is obviously going against the attending's recommendations.

Against this backdrop, Dr. Sivaraman moved for summary judgment. He asserted that there was no evidence in the record that he had actually written the order for heparin for Mrs. Puppolo on December 22. He produced copies of UMMC's records indicating that the prescription for heparin was ordered by Andleeb Kahn, M.D., several weeks before Mrs. Puppolo's death. Thus, he could not be liable under the first theory of breach of standard of care articulated by Dr. Atchabahian. Dr. Sivaraman contended that the

second theory advanced by appellants, namely, that he was responsible for decisions made by residents who were working in the SICU when he was on duty, was inconsistent with this Court's decision in *Franklin v. Gupta*, 81 Md. App. 345 (1990).³

In response, appellants made the following relevant contentions:

(1) The medical records indicate that Dr. Kahn had discontinued her order for heparin on December 21, 2008, but that two doses of heparin were administered to Mrs. Puppolo on December 22nd. Because Dr. Sivaraman was the attending physician in the SICU on that date, and because the records show that he had personally examined Mrs. Puppolo on the morning of the 22nd, a fact-finder could reasonably conclude that Dr. Sivaraman had prescribed the heparin.

(2) If Dr. Sivaraman hadn't ordered the heparin, then Dr. Kahn, who was a resident on duty in the SICU on December 22nd, must have done so. Dr. Sivaraman was

³Dr. Sivaraman presented a third argument to the summary judgment court. He asked that the court strike B. Hugh Dorman, M.D., as an expert witness. Dr. Dorman had been designated by appellants to testify as to breach of standard of care but, according to Dr. Sivaraman, appellants refused to make him available for a deposition.

In response, and in brief summary, appellants conceded that Dr. Dorman had not been deposed as scheduled, but asserted that they cancelled the deposition because they had learned that Dr. Sivaraman "was planning to ambush Dr. Dorman" with medical records that had not previously been provided to them by UMMC. Additionally, appellants contended that UMMC failed to disclose all of Mrs. Puppolo's medical records to them and that UMMC's failure to do so should be attributed to Dr. Sivaraman.

The circuit court did not rule on this request, perhaps because it concluded that granting Dr. Sivaraman's motion on substantive grounds mooted the request to strike. In any event, appellants do not suggest that Dr. Dorman's opinions as to breach of standard of care differ materially from those of Dr. Atchabahian.

liable for any breach in the standard of care on Dr. Kahn’s part under the “borrowed servant” rule.

After a hearing, the circuit court granted the motion for summary judgment stating:

Exhibit 9 on this motion indicates that Dr. Kahn ordered the heparin. On this exhibit in the second larger box, there’s, “entered and electronically signed by Kahn,” and the date is 4 December 2008 at 11:22, “discontinued 23 December 2008 at 17:41” in the box above the larger box below, and it has due – “automatically discontinued due to discharge.”

The Court is concerned about the timing of the automatic stoppage of the heparin, but the Court is more concerned with the relationship between Dr. Kahn and the Defendant, the lack of documentation between – or supporting the assertion that the Defendant ordered, or somehow directed, or approved, or controlled the ordering of the heparin.

The allegations of when the – after the heparin was stopped on December 21st, that Dr. Kahn had anything to do with it actually being ordered again.

The Court is certainly concerned that it’s making a decision in a partial vacuum based on the argument of Plaintiff’s Counsel, the Court is concerned that this is the last in a line of attorneys in this case, so the Court is not holding Plaintiff’s Counsel in any way responsible, but under all of the circumstances, the Court is going to grant the motion for summary judgment.

The Court believes that there are no material disputes or genuine disputes of material facts. The motion is granted.

The circuit court denied appellants’ motion for reconsideration and this timely appeal followed.

Analysis

Summary Judgment

The elements of a medical malpractice action are: “duty (standard of care); breach of the standard of care; causation of injury; and damages.” *Univ. of Md. Med. Sys. Corp. v. Gholston*, 203 Md. App. 321, 330 (2012). *See also Barnes v. Greater Balt. Med. Ctr., Inc.*, 210 Md. App. 457, 480 (2013). For purposes of his summary judgment motion, Dr. Sivaraman concedes that Mrs. Puppolo’s death was caused by the heparin she received on December 22nd. He asserts, however, that there is no evidence in the record from which a fact-finder could reasonably infer that he—as opposed to some other health care professional—breached the standard of care owed to Mrs. Puppolo. Appellants understandably see the record very differently.

Whether summary judgment was properly granted is a question of law, and our review is *de novo*. We review the record in the light most favorable to the non-moving party to decide whether there are issues of material fact. In this exercise, the “record” we consider is the record before the circuit court at the time it ruled on the motion.⁴

⁴We make this point because the record before the summary judgment court was rather sparse. When appellants filed their motion to alter or amend the judgment, both parties filed additional material, consisting, to the extent that it is relevant to the issues on appeal, of additional medical records of Mrs. Puppolo. In some of their arguments to this Court, appellants rely on material presented to the circuit court in support of their motion to alter or amend. The circuit court cannot be faulted for failing to consider documents that were not before it. We will address the additional material presented to the court as
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To avoid summary judgment, the non-moving party must establish the existence of a genuine dispute of material fact. *Beatty v. Trailmaster Prod., Inc.*, 330 Md. 726, 737 (1993). The *Beatty* Court further explained that, to be “genuine” in this context, the dispute must be more than hypothetical or conjectural: “the mere existence of a scintilla of evidence in support of the [non-moving party’s] claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff.” *Id.* at 738-39. Put another way, “when a movant has carried its burden, the party opposing summary judgment ‘must do more than simply show there is some metaphysical doubt as to the material facts.’” *Id.* at 738 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). With this as background, we turn to the parties’ contentions.

Appellants’ breach of duty of care theory was very specific. Dr. Atchabahian opined that Dr. Sivaraman could have breached the appropriate standard of care if (1) he had administered heparin, or ordered heparin to be administered, to Mrs. Puppolo on December 22nd, or (2) if a resident acting under his supervision had ordered heparin on December 22nd and the order was not corrected by Dr. Sivaraman in his capacity as attending physician. Appellants argue that the circuit court erred in granting summary

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part of the motion to alter or amend only to decide whether the circuit court abused its discretion in denying that motion.

judgment because there was a dispute of material fact as to who ordered the heparin administered to Mrs. Puppolo on December 22nd, and the circuit court should have drawn inferences from the records in appellants' favor.

Appellants rely on the following critical documents to support this assertion:

(1) Defendant's Exhibit 9, a printed screen shot from UMMC's "OMNICELL" system,⁵ which indicates that heparin at 10,000 units per bag was ordered on December 4, 2008. This document states that the order was "[e]ntered and electronically signed" by Dr. Kahn and that the medication was automatically discontinued on December 23, 2008 "due to discharge," i.e., Mrs. Puppolo's death.

(2) Plaintiff's Exhibit F, another document from Mrs. Puppolo's medical records, which shows that 25,000 units of heparin were administered to Mrs. Puppolo on six occasions by nurses in the SICU from December 9, 2008, through December 16, 2008. Exhibit F also states that this order was discontinued by Dr. Kahn on December 21, 2008, that is, two days before Mrs. Puppolo's death. It does not indicate who initially ordered the medication at that dosage level.

(3) Plaintiff's Exhibit G-2, which is a portion of an invoice from UMMC indicating that Mrs. Puppolo was given two 10,000 unit doses of heparin on December 22, 2008;

⁵Appellants assert that the OMNICELL system is a computerized record-keeping system by which UMMC tracks the use of pharmaceuticals.

(4) Plaintiff's Exhibit G-1, Dr. Sivaraman's notes for December 22, 2008, showing that he spent 45 minutes with the patient and an additional 15 minutes with her family; and

(5) Plaintiff's Exhibit D, which is Dr. Atchabahian's deposition testimony. In particular, appellants direct us to Dr. Atchabahian's testimony that: (1) Mrs. Puppolo's blood platelet level was dangerously low on December 22; (2) she should not have been given heparin on that day; and (3) the heparin administered to Mrs. Puppolo on that day was the cause of her death.

To this Court, appellants assert:

There is a genuine issue of fact regarding who ordered the heparin on December 22, 2008. Appellants have produced a medical record [that is, Exhibit F] that shows that Dr. Khan discontinued her order of heparin on the night of December 21, 2008. The hospital's billing records and Dr. Atchabahian's testimony support that heparin was given to [Mrs. Puppolo] on December 22, 2008. Appellee Dr. Sivaraman was the one and only attending physician on December 22, 2008 in the SICU and according to his own record he attended to [Mrs. Puppolo] at 10:13 a.m. A reasonable inference can be drawn that Dr. Sivaraman ordered heparin be given to [Mrs. Puppolo] after it had been discontinued the night before.

In response, Dr. Sivaraman contends that:

The undisputed evidence in this case, as demonstrated in Mrs. Puppolo's medical records, shows that the order for heparin that was administered on December 22, 2008 was not written by Dr. Sivaraman. The order for heparin was written by Andleeb Khan, M.D. Because Dr. Sivaraman did not write the order for heparin, he did not violate the standard of care.

When we focus on the material that was before the circuit court in the summary judgment hearing, we conclude, as did the circuit court, that there was no evidence connecting Dr. Sivaraman with the heparin administered to Mrs. Puppolo on that day. To the extent that inferences can be drawn as to who ordered heparin for Mrs. Puppolo at 10,000 units, those inferences point to Dr. Kahn and not Dr. Sivaraman. The record also supports the inference that Dr. Kahn discontinued an order for 25,000 units of heparin on December 21st.⁶

Appellants assert that a fact-finder could reasonably infer that “Dr. Sivaraman ordered heparin be given to [Mrs. Puppolo] after it had been discontinued [by Dr. Kahn] the night before.” The difficulty with this argument is that Mrs. Puppolo received two *10,000* unit doses of heparin on December 22nd, and the order for heparin discontinued by Dr. Kahn on December 21st had been for *25,000* units. There was nothing in the record before the summary judgment court that could support a reasonable inference that Dr. Sivaraman ordered heparin at 10,000 units to be administered to Mrs. Puppolo on December 22nd, or at any other time.⁷ Additionally, there is nothing in the record before

⁶In his response to appellants’ motion to alter or amend, Dr. Sivaraman asserted that the 25,000 unit dosage of heparin was ordered by Michael Boss, M.D., on November 19, 2008, “to prevent blood clots in the patient’s heart” and that Dr. Sivaraman was not on duty on that day. He documents the second, but not the first of these two assertions.

⁷In his brief, Dr. Sivaraman presents a narrative that the two dosages of heparin were prescribed for different therapeutic purposes. He posits that the dosage at 25,000
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the summary judgment court that could give rise to a reasonable inference that a resident working under Dr. Sivaraman’s supervision ordered heparin on that day.

Moreover, based on the record before the summary judgment court, we could conclude that Dr. Sivaraman was responsible for the heparin administered to Mrs. Puppolo on December 22nd only if he breached the standard of care solely because the two doses of heparin were administered while he was on duty in the SICU. But Dr. Atchabahian, appellants’ expert, rejected the so-called “captain of the ship” theory as a basis for liability when he testified that Dr. Sivaraman would be liable *only* if he personally ordered the heparin or if a resident working under his supervision did so. Further, the “captain of the ship” theory has not been the law of Maryland, if indeed it ever was, since *Franklin v. Gupta*, 81 Md. App. 345 (1990). In *Franklin*, we concluded that a physician is responsible for the negligent acts of others only when “the negligent actors were, in fact, under the [doctor’s] direct supervision and control[,]” *id.* at 371, and explicitly “reject[ed] any ‘captain of the ship’ theory of liability.” *Id.* at 374–75. There

⁷(...continued)

units was intended to prevent blood clotting in Mrs. Puppolo’s body, while the 10,000 unit dose was intended to prevent blood clotting in a dialysis machine. To support the latter conclusion, he points to a page from Mrs. Puppolo’s medical records attached as an exhibit to his response to the motion to alter or amend. That document indicates that the heparin at 10,000 units was “[f]or anticoagulation of CRRT filter” and was to be administered through the “prefilter infusion port.” Dr. Sivaraman may very well be correct, but this information was not before the court when it ruled on the motion for summary judgment.

was nothing before the circuit court that could support either conclusion on a basis other than speculation.

The Motion to Alter or Amend Judgment

Appellants assert that the circuit court erred when it denied their motion to alter or amend the judgment. We will reverse a trial court’s decision to grant or deny a motion to alter or amend only if we conclude that the trial court abused its discretion. *Cent. Truck Ctr. Inc. v. Cent. GMC, Inc.*, 194 Md. App. 375, 397-98 (2010). A trial court has nearly “boundless discretion” to grant or deny motions to alter or amend and such a motion “is not a time machine in which to travel back to a recently concluded trial in order to try the case better with hindsight.” *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 484 (2002).

We conclude that the circuit court did not abuse its discretion in denying the motion to alter or amend judgment. Appellants supported their motion with approximately 550 pages of additional medical records. Appellants suggest that the 10,000 unit dosage was, in effect, a standing order to be reinitiated and discontinued as Mrs. Puppolo’s condition required. Dr. Sivaraman does not contest this. *See supra* note 6. Appellants also documented that the SICU staff repeatedly noted that Mrs. Puppolo should not receive heparin when her blood platelet level was depressed. None of this, however, connects the two 10,000 unit doses of heparin administered to Mrs. Puppolo on December 22nd to Dr. Sivaraman under either of the theories put forward by appellants’

expert as a basis for concluding that Dr. Sivaraman breached the standard of care. Under these circumstances, the circuit court did not abuse its discretion in denying appellants' motion to alter or amend the judgment.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. APPELLANTS TO PAY COSTS.