APPENDIX 1

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APPENDIX A

SJC-13095

PAULINE LESLIE vs. J. ALEXANDER BODKIN & others.[1]

October 8, 2021.

Practice, Civil, Action in nature of certiorari.

Pauline Leslie appeals from a judgment of the county court denying, without a hearing, her petition for relief in the nature of certiorari. G. L. c. 249, § 4. In her petition, she sought review of various judgments and orders of the Superior Court and of the Appeals Court. The challenged orders and judgments, however, were all subject to review in the ordinary appellate process. Leslie has already received full appellate review of her claims. See Leslie v. Bodkin, 98 Mass. App. Ct. 1111, S.C., 486 Mass. 1108 (2020); Leslie v. Travelers Ins. Co., 96 Mass. App. Ct. 1105, S.C., 483 Mass. 1108 (2019); Leslie v. Travelers Ins. Co., 92 Mass. App. Ct. 1104, S.C., 478 Mass. 1104 (2017). "It would be hard to find any principle more fully established in our practice than the principle that neither mandamus nor certiorari is to be used as a substitute for ordinary appellate procedure or used at any time when there is another adequate remedy." Miranda v. Superior Court Dep't, 482 Mass. 1008, 1008 (2019), quoting Myrick v. Superior Court Dep't, 479 Mass. 1012, 1012 (2018). The single justice properly denied relief.

Judgment affirmed.

The case was submitted on briefs.

[1] John R. Barrett, Travelers Indemnity Company of Connecticut, and Kingstown Corporation.

Pauline Leslie, pro se.
John P. Graceffa & Brian A. Suslak for the respondents.

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. SJC-13095

PAULINE LESLIE
vs.
J. ALEXANDER BODKIN & others

NOTICE OF DOCKET ENTRY

Please take note that the following entry was made on the docket of the above-referenced case:

November 15, 2021 - DENIAL of Motion for Reconsideration. (By the Court).

Francis V. Kenneally Clerk

Dated: November 15, 2021

To:
Pauline Leslie
Heidi M. Oh, Esquire
Peter C. Kober, Esquire
John P. Graceffa, Esquire
Brian Suslak, Esquire

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2021-0014

Appeals Court
No. 2019-P-1584

Essex Superior Court
No. 177CV01970

PAULINE LESLIE

v.

J. ALEXANDER BODKIN, M.D., JOHN R. BARRETT, KINGSTOWN CORPORATION, AND TRAVELERS INSURANCE COMPANY

JUDGMENT

This matter came before the Court, Georges, Jr., J., on a petition for writ of certiorari pursuant to G. L. c. 249, § 5.

The requisite elements for availability of certiorari are: (1) a judicial or quasi-judicial proceeding, (2) from which there is no other reasonably adequate remedy, (3) to correct a substantial error of law apparent on the record, and (4) that has resulted in manifest injustice to the plaintiff or an adverse impact on the real interests of the general public. See State Board of Retirement v. Woodward, 446 Mass. 698, 703-704 (2006). The petitioner has not demonstrated that her petition satisfied the last three elements.

Upon consideration thereof, it is **ORDERED** that the petition for writ of certiorari be, and the same hereby is, **DENIED** without hearing.

By the Court (Georges, Jr., J.)

/s/ Maura S. Doyle
Maura S. Doyle, Clerk

Entered: February 22, 2021

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APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. **SUPERIOR COURT**
C.A. No. 1777CV01970

PAULINE LESLIE

vs.

J. ALEXANDER BODKIN, M.D. & others[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT J. ALEXANDER BODKIN, M.D.'S MOTION TO DISMISS

This civil action arises from the parties' involvement in a prior lawsuit filed by the plaintiff, Pauline Leslie ("Leslie"), in connection with a 2010 motor vehicle accident (the "underlying lawsuit"). The moving party in this matter, defendant J. Alexander Bodkin, M.D. ("Dr. Bodkin"), served as an expert witness in the underlying lawsuit. He now moves to dismiss the claims brought against him in this civil action pursuant to Mass. R. Civ. P. 12(b)(6) on absolute privilege grounds. After a hearing on the motion on May 31, 2018, and for the reasons that follow, Dr. Bodkin's motion to dismiss is **ALLOWED**.

BACKGROUND

The following facts are taken from the allegations of the Complaint, Dr. Bodkin's March 11, 2015 report to defense counsel in the underlying lawsuit, and the court docket in the underlying lawsuit.

The defendants in the underlying lawsuit were the same as Dr. Bodkin's codefendants in the case at bar: John R. Barrett ("Barrett"), the driver of the truck that struck Leslie's vehicle; Kingstown Corporation ("Kingstown"), Barrett's employer; and Travelers Indemnity Insurance Company ("Travelers"), the insurer for Barrett and Kingstown. According to the Complaint in

[1] Travelers Indemnity Ins. Co., John R. Barrett, and Kingstown Corporation

this matter, Dr. Bodkin was retained by Travelers, Barrett, and Kingstown to conduct an independent medical examination ("IME") of Leslie in connection with the underlying lawsuit. Dr. Bodkin is a psychiatrist. Leslie's mental health was at issue in the underlying lawsuit because she claimed to have suffered post-traumatic stress disorder ("PTSD") that left her unable to drive as a result of the motor vehicle accident. The IME took place over the course of four hours on January 26, 2015, in a conference room at the office of defense counsel in the underlying lawsuit. Following the IME, Dr. Bodkin prepared a report dated March 11, 2015. His video deposition was taken on December 10, 2015.

The Complaint alleges the following claims against Dr. Bodkin: medical negligence (Count I); misrepresentation (Counts III and IV); defamation (Count V); negligent infliction of emotional distress (Count VI); intentional/reckless infliction of emotional distress (Count VII); punitive damages (Count IX); and violation of G. L. c. 93A, §§ 2, 9 (Count X).

The following alleged wrongdoing by Dr. Bodkin during the IME forms the basis of Leslie's medical negligence claim: Dr. Bodkin conducted the IME in a glass conference room at the front entrance of the law firm, where there was little to no privacy; he recorded her without her consent; he failed to advise her that she was entitled to a break and was free not to answer questions outside the scope of the IME; he ignored her complaints about feeling humiliated; he asked her questions that went beyond the scope of any ordinary IME; he asked her inappropriate questions about sex, her private parts and bodily functions, drug use, and religion; he was overly intrusive with respect to Leslie's romantic relationships and family history; he "rolled his hand into a fist and made angry faces while nodding in a threatening manner towards the Plaintiff"; he demonstrated a bias in favor of the defendants who had hired him; and he degraded her treating physicians. Leslie also alleges that, during his deposition on December 10, 2015, Dr. Bodkin

made a statement about slipping pills into her Cheerios without her consent, and made false statements about what Leslie told him during the IME.

Leslie's misrepresentation claims against Dr. Bodkin allege that he included false information in his March 11, 2015 report and materially misrepresented information about Leslie in his video deposition. She also alleges Dr. Bodkin falsely misrepresented in a December 31, 2014 affidavit that Barrett and Kingstown retained Dr. Bodkin, while the attorney representing Barrett and Kingstown advised Leslie that it was Travelers who retained him.

Leslie's defamation claim alleges that Dr. Bodkin accused her of having stunted childhood development, wrote false statements about Leslie and her family in his report, and made false statements during his deposition about what Leslie had told him during the IME.

Leslie's claims for negligent infliction of emotional distress, intentional/reckless infliction of emotional distress, punitive damages, and violation of G. L. c. 93A, §§ 2, 9, are based on the same conduct on which her medical negligence, misrepresentation, and defamation claims are based.

DISCUSSION

A. Motion to Dismiss Standard

To survive a motion to dismiss under Mass. R. Civ. P. 12(b)(6), a complaint must allege facts "plausibly suggesting . . . entitlement to relief[.]" *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). Detailed factual allegations are not required, but the plaintiff must present more than mere "labels and conclusions," such that the alleged facts "raise a right to relief above a speculative level." *Id.*, quoting *Twombly*, 550 U.S. at 555. In determining whether a complaint meets this standard, the court accepts the factual allegations in the complaint as true and draws reasonable inferences in favor of the plaintiff. *Harrington* v. *Costello*, 467 Mass. 720, 724 (2014).

As a general rule, the court's consideration of a motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6) is confined to the four corners of the complaint. Exceptions to this rule include "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint." *Reliance Ins. Co.* v. *Boston*, 71 Mass. App. Ct. 550, 555 (2008), quoting *Schaer* v. *Brandeis Univ.*, 432 Mass. 474, 477 (2000). The court may also consider documents not attached to the complaint, but upon which the plaintiff relied in framing the complaint, in reviewing a motion to dismiss. *Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004). Here, in addition to the Complaint, the court also considers the court docket in the underlying lawsuit as a matter of public record, as well as Dr. Bodkin's March 11, 2015 report, which Leslie relied on in framing the Complaint.

B. Analysis

Because all of Dr. Bodkin's alleged statements and conduct were in the course of his role as an expert witness in the underlying lawsuit, those statements and conduct are protected by "absolute privilege" and Leslie's claims against Dr. Bodkin must be dismissed.

Under the doctrine of absolute privilege, "statements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding are absolutely privileged provided such statements relate to that proceeding." *Sriberg* v. *Raymond*, 370 Mass. 105, 108 (1976); *Correllas* v. *Viveiros*, 410 Mass. 314, 319 (1991)("Statements made in the course of a judicial proceeding which pertain to that proceeding are . . . absolutely privileged and cannot support a claim of defamation."). The public policy behind this rule is that full disclosure in court proceedings should not be hampered by witnesses' fear of a civil action being brought against them as a result of their statements. *Correllas*, 410 Mass. at 320. See *Aborn* v. *Lipson*, 357 Mass. 71, 72 (1970) ("[I]t is more important that witnesses be free from the fear of civil liability for

what they say than that a person who has been defamed by their testimony have a remedy."). "The absolute privilege provides a complete defense even if the offensive statements are uttered maliciously or in bad faith." *Doe* v. *Nutter, McClennen & Fish*, 41 Mass. App. Ct. 137, 140 (1996). It protects the person making the statements "from any civil liability based thereon." *Id.* "To rule otherwise would make the privilege valueless if an individual would then be subject to liability under a different theory." *Id.* at 141.

The absolute privilege applies to expert witnesses as well as to lay witnesses. *Hoult* v. *Brant*, 51 Mass. App. Ct. 1107, *2 (2001) (Unpub. Rule 1:28 decision) (plaintiff's claims against psychiatrist who testified as expert witness for plaintiff's daughter in civil suit against plaintiff alleging sexual abuse were barred by absolute privilege). The policy reasons underpinning the doctrine apply equally to expert witnesses. *Id.*

Here, all of the Complaint's allegations against Dr. Bodkin relate to his role as an expert witness in the underlying lawsuit. Regardless of what the claims are labeled, all of Dr. Bodkin's alleged wrongdoing was in the context of the IME, his subsequent written report, and deposition testimony. Based on the precedent cited above, the absolute privilege is a complete defense to Leslie's allegations against Dr. Bodkin; therefore, her claims against him must be dismissed.

ORDER

For the foregoing reasons, the defendant J. Alexander Bodkin, M.D.'s motion to dismiss is **ALLOWED**. All of the Complaint's claims against Dr. Bodkin are hereby **DISMISSED**.

Dated: June 11, 2018

Janice W. Howe
Janice W. Howe
Justice of the Superior Court

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1584

PAULINE LESLIE

vs.

J. ALEXANDER BODKIN & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Pauline Leslie, appeals from judgments, entered by two different Superior Court judges, dismissing her claims against the defendants, and from an order denying her motion to reconsider. This case stems from a motor vehicle accident that occurred in 2010.[2] Leslie filed this action

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[1] John R. Barrett, Kingstown Corporation, and Travelers Company of Connecticut, "misnamed as Travelers Indemnity Insurance Company."

[2] There has been extensive litigation stemming from the accident, including cases filed in Suffolk County, Essex County, and two prior appeals in this court. See, e.g., Leslie v. Travelers Ins. Co., 96 Mass. App. Ct. 1105 (2019); Leslie v. Travelers Ins. Co., 92 Mass. App. Ct. 1104 (2017). There was also an action filed in the United States District Court for the District of Massachusetts. Leslie vs. Superior Court of Mass., U.S. Dist. Ct., No. 17-12384 (D. Mass. Dec. 22, 2017). The underlying facts are set forth in the various judgments and appellate decisions and need not be repeated here. In essence, John R. Barrett, while driving a tractor trailer owned by Kingstown Corporation, rear-ended a car being driven by Leslie and in which her two children were passengers. Travelers was

against defendant Doctor J. Alexander Bodkin, who was retained to conduct an independent medical examination (IME) of Leslie pursuant to Mass. R. Civ. P. 35, 365 Mass. 793 (1974).[3] Leslie also filed claims against defendants John R. Barrett and Kingstown Corporation (Kingstown defendants) and defendant Travelers Company of Connecticut (Travelers) under a theory of agency.[4] Acting on Bodkin's motion to dismiss, a judge dismissed the claims against Bodkin on the ground of absolute privilege. Summary judgment was ordered by a second judge in favor of the Kingstown defendants and Travelers. We affirm.

1. Claims against Bodkin. We review the allowance of a motion to dismiss pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), de novo. Galiastro v. Mortgage Elec. Registration Sys., Inc., 467 Mass. 160, 164 (2014). We accept the allegations in the complaint as true and draw all reasonable inferences in favor of the nonmoving party. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 625 n.7 (2008); Baker v. Wilmer

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Kingstown's business automobile insurer. Liability was conceded. After a trial on damages, the jury returned a verdict awarding $6,749.29 to Leslie, and $6,414.70 to one of the two children. The other child was not awarded any damages.

[3] The claims included medical negligence, misrepresentation, defamation, negligent infliction of emotional distress, intentional infliction of emotional distress, punitive damages, and violation of G. L. c. 93A.

[4] These claims included medical negligence, misrepresentation, negligent infliction of emotional distress, negligent entrustment, punitive damages, and violation of G. L. c. 93A.

Cutler Pickering Hale & Dorr, LLP, 91 Mass. App. Ct. 835, 842 (2017). "The ultimate inquiry is whether the plaintiffs alleged such facts, adequately detailed, so as to plausibly suggest an entitlement to relief." Id., quoting Greenleaf Arms Realty Trust I, LLC v. New Boston Fund, Inc., 81 Mass. App. Ct. 282, 288 (2012).

In the underlying lawsuit, Leslie claimed, among other things, that she was permanently disabled and suffered from posttraumatic stress disorder rendering her unable to drive, all resulting from the car accident. See generally Leslie v. Travelers Ins. Co., 92 Mass. App. Ct. 1104 (2017). The defendants filed a motion to require Leslie to undergo an IME pursuant to Mass. R. Civ. P. 35. The motion was initially denied, then allowed upon reconsideration. The IME took place in a conference room at the offices of defense counsel because Leslie objected to driving to Bodkin's office. As part of the IME, Bodkin reviewed Leslie's prior medical records and conducted a four-hour examination of Leslie, which was recorded by both Leslie and Bodkin. He also testified by video deposition at the trial. Travelers paid Bodkin.

Leslie alleged that, among other things, Bodkin should not have reviewed her medical records, that he asked her inappropriate questions, conducted himself unprofessionally, was demeaning to her, and recorded her without her knowledge.

Bodkin denies the allegations and asserts that Leslie's claims must fail because he is protected by the absolute privilege. Here, all of the statements and conduct in question were made "by a . . . witness in the institution of, or during the course of, a judicial proceeding." Sriberg v. Raymond, 370 Mass. 105, 108 (1976). As such, Bodkin's statements and conduct "are absolutely privileged." Id.

Despite Leslie's argument to the contrary, the IME was in all respects part of a judicial proceeding. Even if Leslie's allegations were true, which we must assume for the purposes of a rule 12 (b) (6) motion, the IME was ordered by a judge, pursuant to a motion, to assess the cause and extent of Leslie's disability. This was necessitated, in part, because the defendants claimed that Leslie was exaggerating her symptoms. Indeed, Leslie's complaints about Bodkin's work are "the very thing[s] against which the privilege is directed." Sullivan v. Birmingham, 11 Mass. App. Ct. 359, 366 (1981). "An absolute privilege provides a complete defense even if the offensive statements are uttered maliciously or in bad faith." Doe v. Nutter, McClennen & Fish, 41 Mass. App. Ct. 137, 140 (1996), citing Correllas v. Viveiros, 410 Mass. 314, 319 (1991). "An absolute privilege is favored because any final judgment may depend largely on the testimony of the party or witness, and full disclosure, in the interests of justice, should not be

hampered by fear of an action for defamation." Correllas, supra at 320, citing Restatement (Second) of Torts § 588 comment (a) (1977). The complaint was properly dismissed.

We review the denial of Leslie's motion for reconsideration for an abuse of discretion. See Littles v. Commissioner of Correction, 444 Mass. 871, 879 (2005); Piedra v. Mercy Hosp., Inc., 39 Mass. App. Ct. 184, 186-188 (1995). A motion for reconsideration filed pursuant to Mass. R. Civ. P. 59 (e), 365 Mass. 827 (1974), is "designed to correct judgments which are erroneous because they lack legal or factual justification." Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Comm'n, 394 Mass. 233, 237 (1985). Here, Leslie's motion was both devoid of any new information and did not set forth any information that was previously unavailable to her. The motion was properly denied.

2. Claims against the Kingstown defendants and Travelers. We review the grant of summary judgment de novo to determine "whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Karatihy v. Commonwealth Flats Dev. Corp., 84 Mass. App. Ct. 253, 255 (2013), quoting Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). The second judge granted summary judgment on so much of the complaint that alleged

liability under a theory of agency, and on count IV of the complaint, which alleged misrepresentation (not based on agency).

Viewing the evidence in the light most favorable to Leslie, she failed to provide any evidence that these defendants exercised any control over Bodkin or that they directed, supervised, or controlled him.[5] See Paradoa v. CNA Ins. Co., 41 Mass. App. Ct. 651, 654-655 (1996). Accordingly, these defendants cannot be vicariously liable for Bodkin's alleged misconduct because no agency relationship existed between them. In the simplest of terms, Leslie's agency allegations are bald assertions, and without more are insufficient to avoid the entry of summary judgment. See Mass. R. Civ. P. 56 (e), 365 Mass. 824 (1974) ("Supporting and opposing affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence . . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleading . . .").

As to the misrepresentation claim, Leslie must prove that she reasonably relied on the defendants' misrepresentations

[5] Leslie claims that the second judge erred in failing to determine which of the three defendants retained Bodkin. This argument is of no moment as the result is the same regardless of who retained Bodkin.

about Bodkin, and acted upon those representations to her detriment. See Cumis Ins. Soc'y, Inc. v. B.J.'s Wholesale Club, Inc., 455 Mass. 458, 471-473 (2009). Leslie did not set forth any evidence of how she reasonably relied on any misrepresentation, if one was made. See id. Therefore, summary judgment was properly granted.

3. Other claims. Leslie intersperses additional claims and contentions throughout her brief. We have examined all of her points and arguments. That we have not addressed them all means simply that "[w]e find nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

Judgments affirmed.[6]

Order denying motion to reconsider affirmed.

By the Court (Blake, Massing & Neyman, JJ.[7]),

Joseph F. Stanton
Clerk

Entered: September 21, 2020.

[6] Leslie's request for costs and expenses is denied.
[7] The panelists are listed in order of seniority.

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1645

PAULINE LESLIE & others[1]

vs.

TRAVELERS INSURANCE COMPANY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs appeal from the summary judgment entered in favor of the defendant on the plaintiffs' negligence claim, infliction of emotional distress claims, and violation of G. L. c. 93A or G. L. c. 176D claim.[2] We affirm.

1. Background. On behalf of herself and her two minor children, plaintiff Pauline Leslie filed a bodily injury lawsuit against John R. Barrett and his employer, Kingstown Corporation (Kingstown), following a motor vehicle accident in December, 2010. The claims against Travelers Insurance Company (Travelers)[3] were stayed. The bodily injury claims against

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[1] Pauline Leslie's two minor children.

[2] The plaintiffs also appeal from the order denying their motion for reconsideration.

[3] The defendant's brief states that it is submitted on behalf of "Travelers Indemnity Company of Connecticut, misnamed as Travelers Insurance Company."

Kingstown and Barrett were tried to a jury in December, 2015; these defendants conceded liability. The sole issue for the jury was damages. After a four-day trial, the jury returned a verdict awarding $5,260.80 to Leslie; $5,000 to one minor child; and no damages to the other minor child. A different panel of this court affirmed that judgment in August, 2017.[4]

Travelers was the business automobile liability insurer of Kingstown at the time of the accident. Travelers began investigating the claim, and in January, 2013, made a settlement offer of $185,000 that was rejected by Leslie. The offer was increased in March, 2013, to $195,000; Leslie also rejected that offer. Following an unsuccessful mediation, in March, 2014, Travelers offered $260,000; Leslie again rejected the offer. In February, 2018, Travelers moved for summary judgment. After oral argument, its motion was allowed, and judgment entered for Travelers. After denial of the plaintiffs' motion for reconsideration, this appeal followed.

2. Discussion. a. Summary judgment. A motion for summary judgment is appropriate where "the moving party . . . 'show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law' based on the undisputed facts." Premier Capital, LLC v.

[4] Leslie v. Travelers Ins. Co., 92 Mass. App. Ct. 1104 (2017).

KMZ, Inc., 464 Mass. 467, 474 (2013), quoting Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). "In reviewing the grant of a motion for summary judgment, we conduct a de novo examination of the evidence in the summary judgment record . . . and view the evidence in the light most favorable to the part[y] opposing summary judgment," LeBlanc v. Logan Hilton Joint Venture, 463 Mass. 316, 318 (2012), "drawing all reasonable inferences in [the nonmoving party's] favor." Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 38 (2005).[5]

i. Negligence claim. Count I of the plaintiffs' amended complaint is entitled "Negligence against all Defendants." However, the plaintiffs fail to allege any act or omission of Travelers that contributed to the accident and resultant damages. See Madsen v. Erwin, 395 Mass. 715, 731 (1985). There was no error in the entry of summary judgment on this count.

ii. Infliction of emotional distress claims. Counts IX, X, and XIII of the plaintiffs' amended complaint allege that they experienced emotional distress as a result of the conduct of the defendant's private investigator. While Travelers acknowledged using a private investigator in the course of its

[5] The plaintiffs have included in the record appendix voluminous material that is outside of the summary judgment record. Our review is limited to only those materials that constitute the record considered by the Superior Court judge in connection with the motion for summary judgment. See Mass. R. A. P. 18 (a) (1) (A) (v) (a) & (b), as appearing in 481 Mass. 1637 (2019).

business in evaluating personal injury claims, the plaintiffs failed to show that the private investigator who committed the acts of which they complain was actually hired by Travelers. Although the plaintiffs contended that they had "proof" that the investigator worked for Travelers, they never produced any evidence, nor does the summary judgment record contain such evidence. There was no error in the entry of summary judgment on these counts.

iii. Violation of G. L. c. 93A or G. L. c. 176D claims. Count XIV of the plaintiffs' amended complaint alleges that Travelers violated G. L. c. 93A or G. L. c. 176D. The plaintiffs claim that Travelers failed to effectuate a prompt, fair, and equitable settlement of their claims when liability was reasonably clear. Liability, in this sense, encompasses both fault and damages. See Clegg v. Butler, 424 Mass. 413, 421 (1997). The plaintiffs rejected any settlement offer that was less than the limits of Kingstown's insurance policy, even though their ultimate recovery was well less than those limits. Indeed, Travelers's settlement offers were reasonable as the plaintiffs' damages were not clear. As the jury verdicts came in much lower than the most recent offer of settlement, this is further evidence of the reasonableness of the offer. There was no error in the entry of summary judgment on this count.

b. Discovery. The plaintiffs contend that they were denied discovery; however, prior to the stay of the claims against Travelers, the plaintiffs did, in fact, conduct discovery. They have failed to show how further discovery would have been relevant to their claims. See Commonwealth v. Fall River Motor Sales, Inc., 409 Mass. 302, 307-308 (1991); Blake Bros. Corp. v. Roche, 12 Mass. App. Ct. 556, 560-561 (1981).

Furthermore, the plaintiffs failed to provide an affidavit showing why they could not "present by affidavit facts essential to justify [their] opposition" in response to the motion for summary judgment, as required by Mass. R. Civ. P. 56 (f), 365 Mass. 824 (1974). This failure is fatal to the argument that the plaintiffs were prejudiced by a lack of discovery. Brick Constr. Corp. v. CEI Dev. Corp., 46 Mass. App. Ct. 837, 840 (1999). There was no error.

c. Remaining claims. The plaintiffs make additional claims regarding the trial in the bodily injury case and the trial judge. These claims are not properly before us and we do not address them. We also pause to note that self-represented litigants are bound by the same rules of procedure as litigants

with counsel. Briscoe v. LSREF3/AH Chicago Tenant, LLC, 481 Mass. 1026, 1027 (2019).[6]

Judgment affirmed.

Order denying motion for reconsideration affirmed.

By the Court (Blake, Ditkoff & Hand, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: October 16, 2019.

[6] To the extent that we have not specifically addressed subsidiary arguments in the plaintiffs' brief, they have not been overlooked. "We find nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

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

APPENDIX F

16-P-528
Appeals Court of Massachusetts.

Leslie v. Travelers Ins. Co.

92 Mass. App. Ct. 1104 (Mass. App. Ct. 2017) · 87 N.E.3d 1202
Decided Aug 25, 2017

16–P–528

08-25-2017

Pauline LESLIE & others v. TRAVELERS INSURANCE COMPANY & others.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On behalf of herself and her two daughters (collectively, plaintiffs), Pauline Leslie brought this personal injury action against the defendants as a result of a motor vehicle accident that occurred on December 22, 2010. On that day, defendant John R. Barrett, who was driving a tractor-trailer owned by codefendant Kingstown Corporation, "rear-ended" Leslie's vehicle. The defendants conceded liability, and the four-day trial proceeded strictly on the issue of the extent of damages suffered. The jury returned a verdict awarding $6,749.29 (including prejudgment interest) to Leslie; $6,414.70 (including prejudgment interest) to Williams, and no damages to Osgood.[4] The plaintiffs' subsequent motion to set aside the jury verdict and for a new trial was denied.[5]

[4] Although three separate judgments entered, we treat them as one judgment.

[5] According to the Superior Court docket sheet, the plaintiffs did not timely appeal the denial of this motion; as a result, it is not part of this appeal.

The plaintiffs now appeal from the December 17, 2015, judgment, arguing several errors: (1) the trial judge abused her discretion in refusing to continue the trial when co-counsel withdrew after jury empanelment; (2) the trial judge wrongfully excluded the plaintiffs' revised medical records; (3) the trial judge wrongfully admitted certain medical records offered by the defendants; and (4) counsel provided ineffective assistance. We affirm.

Continuance. We consider first the plaintiffs' claim that the judge abused her discretion in denying their motion for a continuance and "forcing" them to trial without adequate assistance of counsel. After jury empanelment, "lead counsel's" renewed motion to withdraw was allowed due to what he described as an ethical conflict. The judge then stated her intention to dismiss the case for want of prosecution if the plaintiffs did not go forward without him.[6] The plaintiffs did not object to the judge's decision at that time. Because they raise this issue for the first time on appeal, the argument is waived. See Smith v. Sex Offender Registry Bd., 65 Mass. App. Ct. 803, 810 (2006).

[6] The attorney had filed a motion to withdraw the previous week, but withdrew it after speaking with Leslie. At the time of his renewed motion, he informed the judge that he had played no role in the preparation of the trial exhibits, which documents he claimed were at the root of the issue that "raised an ethical dilemma for [him]"; he had contacted an attorney

specializing in ethical matters and had been advised to withdraw immediately as counsel.

Nonetheless, we are satisfied that it was not an abuse of discretion for the judge to require the plaintiffs to go forward with their two remaining attorneys, who had been counsel of record from the beginning of the case and who also had been actively involved throughout discovery and pretrial proceedings. The judge concluded that, because Leslie's behavior had triggered the ethical issue that prompted the attorney's withdrawal, she should not be rewarded with a continuance.

In addition, witnesses for both the plaintiffs and the defendants were present, and the defendants were ready to proceed; the jurors were empaneled and waiting to hear evidence; and the defendants objected to a continuance, agreeing with the judge that they would move to dismiss the case for want of prosecution. Finally, the plaintiffs failed to articulate at the time any legitimate reason why a continuance should have been granted,[7] given that Leslie "contributed to [her] own disability and the judge could take that into consideration." Beninati v. Beninati, 18 Mass. App. Ct. 529, 534 (1984).

[7] In support of the motion for a continuance, one of the two remaining attorneys argued that the documents to be admitted as exhibits were missing certain records and that she had only recently come back to working on this case after a period of absence; the second attorney argued that other documents had not been sufficiently redacted. The second attorney added that the two attorneys had been "up last night all night ... until 5:30" gathering all of Leslie's medical records into binders and had redacted the documents but did not have time to make copies. The judge found that these excuses did not justify allowing the motion for a continuance.

In regard to the denial of the defendants' motion for a continuance, "[w]e review the judge's [action] ... to see whether there has been abuse of discretion." Botsaris v. Botsaris, 26 Mass. App. Ct. 254, 256 (1988). "Whether a case shall be continued or proceed to trial is within the sound discretion of the judge."Beninati, supra, citing Nobel v. Mead–Morrison Mfg. Co., 237 Mass. 5, 16 (1921). Under all of the circumstances here, even if the issue were not waived, we are satisfied that the judge did not abuse her discretion in denying the motion for a continuance. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

Medical records. The plaintiffs next argue that the judge erred in excluding certain of Leslie's medical records that had been amended shortly before trial, and in admitting records submitted by the defendants that did not comply with G.L.c. 233, § 79G. These arguments are without merit.

"We review a trial judge's evidentiary decisions under an abuse of discretion standard." N.E. Physical Therapy Plus, Inc. v. Liberty Mut. Ins. Co., 466 Mass. 358, 363 (2013). In applying this standard, we look to determine whether "the judge made 'a clear error of judgment in weighing' the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives." L.L., supra (citation omitted).

First, the plaintiffs argue that the judge erred in excluding two medical records that they properly offered pursuant to G.L.c. 223, § 79G,[8] as, they contend, it was the defendants' burden to rebut these authenticated records. We disagree. The records that the plaintiffs offered had been amended recently by the respective providers, at Leslie's request, by attaching addenda containing information favorable to her case three to five years after the original records were generated.[9] Notably, these addenda were made by an employee at each provider, not the original drafter, and served upon the defendants shortly before trial. With this in mind, the judge reasonably could have found that the evidence was not reliable, particularly because the revisions were made several years after the original reports were generated, for the purpose of trial, and by

unknown persons who had not personally treated Leslie. See Commonwealth v. Evans, 438 Mass. 142, 155 (2002). We see no abuse of discretion.

[8] General Laws c. 233, § 79G, is an exception to the hearsay rule, allowing the admissibility of only those portions of medical records relating to treatment and medical history "to establish the reasonable value of services rendered where the services are related to the injury for which the claim is made." Law v. Griffith, 457 Mass. 349, 353 (2010). These records are included "under an expansion of the business records exception, as 'the safeguards of trustworthiness of records of the modern hospital are at least as substantial as the guarantees of reliability of records of business establishments generally.' " O'Malley v. Soske, 76 Mass. App. Ct. 495, 497–498 (2010), quoting from 2 McCormick, Evidence § 293, at 319–320 (6th ed. 2006). See Mass. G. Evid. § 803(6)(B) (2017).

[9] One of the excluded medical records was an ambulance report generated by PRO EMS, the ambulance service that responded to the scene on the day of the accident, with an attached "ADDEND[UM]" dated October 12, 2015. The second was generated by Sports Medicine North, originally authored and signed on August 2, 2012, by Dr. Fehnel, who had treated Leslie in 2012; on October 6, 2015, an "Addendum" was added regarding Leslie's prescribed restrictions.

Next, the plaintiffs' argument that the defendants' documents were erroneously admitted pursuant to § 79G is also without merit. On November 18, 2015, almost one month prior to trial, the defendants notified the plaintiffs, by certified mail, that they would be offering in evidence certain medical records of Leslie[10] ; at trial the judge acknowledged that the defendants' notice letter, including the return receipt, was in the court's file. Because the defendants' submission complied with the statutory safeguards provided in § 79G, the judge did not err in admitting the records in evidence. See G.L.c. 233, § 79G ; Commonwealth v. Schutte, 52 Mass. App. Ct. 796, 798, 799–800 (2001).

[10] Medical records from Lynn Dental Health, MRI Centers of New England—Peabody, Sports Medicine North, and PRO EMS.

Ineffective assistance. Finally, for the first time on appeal, the plaintiffs claim ineffective assistance of counsel, arguing that their two remaining counsel were forced to proceed unprepared; they also contend that, upon instruction by defense counsel, one of their trial counsel inappropriately redacted relevant information, to Leslie's detriment, from the certified medical records. "A claim of ineffective assistance of counsel is a well-established ground for a collateral attack on a decision in a criminal case. See Commonwealth v. Curtis, 417 Mass. 619, 624 n.3 (1994). Such a claim is not a basis for a collateral attack on a civil judgment, where a litigant's sole recourse for his attorney's negligence is an action for malpractice. See Bell v. Eastman Kodak Co., 214 F.3d 798, 802 (7th Cir. 2000). As a general rule, there is no right to the effective assistance of counsel in civil cases. See, e.g., Pokuta v. Trans World Airlines, Inc., 191 F.3d 834, 840 (7th Cir. 1999), and cases cited." Commonwealth v. Patton, 458 Mass. 119, 124 (2010).[11] , [12]

[11] To the extent that we do not address the parties' other contentions, "they 'have not been overlooked. We find nothing in them that requires discussion.' " Department of Rev. v. Ryan R., 62 Mass. App. Ct. 380, 389 (2004), quoting from Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

[12] The defendants' motion to strike the brief and appendix submitted by the plaintiffs is denied, as we did not consider any materials, or references thereto, that were not part of the trial record.

Judgment affirmed.

Additional material from this filing is available in the Clerk's Office.