18-P-1076 Appeals Court

MARGARET V. ZALESKAS & another[1] vs. BRIGHAM AND WOMEN'S HOSPITAL & others.[2]

No. 18-P-1076.

Suffolk. April 2, 2019. - February 11, 2020.

Present: Rubin, Henry, & Wendlandt, JJ.

Medical Malpractice, Consent to medical treatment, Damages, Expert opinion, Standard of care, Tribunal. Negligence, Medical malpractice, Medical technician, Spoliation of evidence, Wrongful death. Consent. Practice, Civil, Summary judgment, Affidavit, Discovery, Hearsay, Wrongful death. Evidence, Determination of medical malpractice tribunal, Hearsay, Past recollection recorded, Privileged record. Damages, Conscious pain and suffering. Conscious Pain and Suffering. Emotional Distress. Wrongful Death. Hospital, Peer review. Witness, Expert.

Civil action commenced in the Superior Court Department on August 4, 2014.

The case was heard by Douglas H. Wilkins, J., on motions for summary judgment, and motions to alter or amend the judgment and for vacatur also were considered by him.

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[1] Kara M. Zaleskas, individually and as administratrix of the estate of Donna Maria Zaleskas.

[2] James Connors, Yingbo Zhang, Carlo Valentin, Rade Boskovic, and Ahmed Mohammed.

Kara M. Zaleskas for the plaintiffs.
Brian H. Sullivan & Amy E. Goganian (Rebecca A. Cobbs & Kara A. Bettigole also present) for the defendants.

HENRY, J. This case arises out of an X-ray exam conducted on a terminally ill cancer patient. The plaintiffs' second amended complaint stated twelve counts against the defendants, including battery and intentional infliction of emotional distress. On cross motions for summary judgment, a judge of the Superior Court entered judgment in favor of the defendants.

We are required in this case to consider whether there is a viable cause of action for battery, in the medical context, based on withdrawal of consent. We conclude that there is. In a case such as this, which involves a claim that the patient asked X-ray technologists to stop amidst the taking of X-rays, we also conclude that expert testimony about the feasibility of stopping is not required. Because there are factual disputes as to whether the patient withdrew her consent during the X-ray exam, the judgment is reversed as to the claim of battery under a theory of withdrawal of consent. Because the same facts also support claims for intentional infliction of emotional distress, violation of G. L. c. 111, § 70E, and breach of warranty, the judgment on those claims is also reversed. In all other respects, the judgment is affirmed, as are the orders on appeal.

Background.[3] On August 4, 2011, Donna Zaleskas, a terminal cancer patient receiving care at Brigham and Women's Hospital (hospital), was experiencing severe pain in her left leg and knee. Her doctor ordered X-rays. Several radiology technologists -- James Connors, Yingbo Zhang, Carlo Valentin, Rade Boskovic, and Ahmed Mohammed (collectively, the technologists) -- participated in the X-ray exam. Connors, the lead technologist, told Donna's sister, Kara, and her mother, Margaret, that if Donna experienced too much pain, he would stop.[4] Connors denied Kara's request to remain in the X-ray room during the exam, but Kara and Margaret remained just outside.

It is undisputed that Connors informed Kara and Margaret that he had ended the exam early -- after five X-ray images, instead of the six the doctor ordered. The judge recited that "Donna's x-rays were in fact stopped prior to completion." However, in the light most favorable to the plaintiffs, the technologists took all six X-rays ordered.[5] Indeed, the

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[3] "[W]here both parties have moved for summary judgment, the evidence is viewed in the light most favorable to the party against whom judgment [has entered]." Boazova v. Safety Ins. Co., 462 Mass. 346, 350 (2012), quoting Albahari v. Zoning Bd. of Appeals of Brewster, 76 Mass. App. Ct. 245, 248 n.4 (2010).

[4] Because the plaintiffs and the decedent share a surname, we refer to the decedent and the plaintiffs individually by their first names and to the plaintiffs collectively as the plaintiffs.

[5] The plaintiffs argue, and the record indicates, that six X-ray images were taken, thereby demonstrating that the exam did

defendants argued in response to the plaintiffs' motion for summary judgment that "[a] genuine issue of material fact exists regarding whether the x-rays were timely terminated."

As we discuss infra, an open question exists whether there is additional admissible evidence of what happened during the X-ray exam. At a deposition taken on March 30, 2017, over five years after the day in question, Kara testified about her observations of Donna's symptoms of pain and hearing Donna pleading and begging during the X-ray exam but stated that she was "not sure whether [Donna] ever said 'stop.'" Similarly, Margaret, at her deposition over five years later, could not recall if she heard Donna say, "stop."

However, the record includes three documents that may be admissible to prove that Donna asked the technologists to stop, provided the required evidentiary foundation is laid. First, as soon as Kara returned home from the hospital after the X-ray exam, in the early morning hours of August 5, 2011, she wrote a summary of the events in question and e-mailed that summary to her mother and other sister (August 5 e-mail summary or summary). In that summary, Kara stated that she and her mother heard "Donna's plaintive pleading -- 'please, please, please,

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not cease prior to completion. To the extent the defendants cited a question asked of Connors at his deposition, questions are not evidence. See Commonwealth v. Gomez, 450 Mass. 704, 713 (2008).

please, please, please . . .,'" and that "Donna continued to wail and beg for them to stop" and that ten minutes later, the X-rays were done. Kara adopted this summary, swearing to it, in a declaration dated April 8, 2015, which was before the date of the deposition.

The second document is the hospital's redacted patient family relations report (family relations report). On August 5, 2011, the day after the X-rays were taken, the plaintiffs reported their concerns about the X-ray exam to hospital staff. The family relations report, written by Stacey Bukuras, the person who investigated the plaintiffs' concerns, documented that Kara and Margaret reported that after the door to the X-ray room closed, "for the following 20 minutes, they heard [Donna] 'wailing,' 'begging to "please stop."'"

The third document is Kara's contemporaneous handwritten notes (Kara's notes) of a call with Bukuras. Kara's notes stated that nursing director Eileen Molina "acknowledged that [Donna] asked to stop" and the "exam could've been stopped." Kara's notes also reflected that the technologists "cut [the X-ray exam] short -- not as short as it should've been."

Connors recalled Donna's X-ray exam and responded in discovery that "at no point did she request that the x-ray be stopped." He also testified that "[i]t is never reasonable or appropriate to continue an X-ray procedure after a patient has

indicated that [they] wish the technician to stop." In their opposition to the plaintiffs' motion for summary judgment, the defendants stated that the "technologists [also] testified that it is their custom and practice to stop an X-ray if a patient asks them to stop." The defendants also acknowledged in their opposition that whether Donna withdrew her consent was a material dispute of fact.

The X-rays revealed that Donna did have a new fracture in her left femur, and she was treated with an immobilization brace. Donna died on August 10, 2011.

The plaintiffs filed this action on August 4, 2014.[6] A medical malpractice tribunal was held on December 11, 2015; the tribunal found for the hospital and technologists (collectively, defendants). The plaintiffs timely posted a bond, and the parties proceeded with discovery. After extensive motion practice regarding discovery, the plaintiffs moved for summary judgment, asserting two theories of battery: withdrawn consent and lack of informed consent. Shortly thereafter, the defendants moved for summary judgment on all twelve counts. The

[6] The second amended complaint alleged twelve causes of action: battery; violations of G. L. c. 111, § 70E; negligence; negligent infliction of emotional distress; intentional infliction of emotional distress; breach of express warranty; loss of consortium; conscious pain and suffering; wrongful death; and gross negligence. Both Kara and Margaret alleged intentional infliction of emotional distress and negligent infliction of emotional distress.

defendants' motion characterized the claim for battery as an informed consent claim. The judge granted the defendants' motion and denied the plaintiffs' motion.

The judge's summary judgment decision, understandably, focused on the plaintiffs' failure to produce expert testimony on any issue. As for the issue of withdrawn consent, the judge determined, without elaboration, that there was no competent evidence that Donna asked to stop the X-rays. The judge did not address the admissibility of the documents previously described (i.e., Kara's August 5 e-mail summary, the family relations report, and Kara's notes). He noted that an affidavit cannot be used to contradict a deposition. He also stated that "to the extent that the plaintiffs' case depends upon the credibility of their witnesses, the Court cannot assume that a jury would find them credible." The plaintiffs' motions for reconsideration and vacatur were denied. The plaintiffs appealed.

Discussion. 1. Summary judgment standards. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). We review a decision to grant summary judgment de novo. See Ritter v. Massachusetts Cas. Ins. Co., 439 Mass. 214, 215 (2003). Before turning to the merits of the

appeal, we address several issues that arose during resolution of the parties' motions for summary judgment.

a. Deposition testimony differing from prior declaration. It is well-settled that one cannot create an issue of fact sufficient to defeat summary judgment by submitting a later affidavit that contradicts one's own prior deposition testimony. See Hanover Ins. Co. v. Leeds, 42 Mass. App. Ct. 54, 58 (1997). This is not such a case, however, for two reasons. First, Kara's declaration, which adopted her August 5 e-mail summary that Donna said to stop during the X-ray exam, came before -- not after -- the deposition. Second, in the light most favorable to the plaintiffs, the declaration and the later deposition are not in conflict with one another. Rather, in the required light, Kara's deposition spoke to her memory at the time of the deposition over five years after the fact, rather than what she knew earlier.[7] Thus, her declaration should not have been disregarded simply because it differed from her deposition testimony. Palermo v. Brennan, 41 Mass. App. Ct. 503, 508 (1996) (conflict between affidavit made prior to deposition and deposition, absent election between versions, must be resolved at trial).

[7] Indeed, the plaintiffs take this position in their briefing -- the contemporaneous summary adopted by Kara in her declaration was accurate and their memories faded over the intervening years.

Kara's declaration standing alone, however, was not sufficient to defeat summary judgment unless the facts it contained would be admissible in evidence. Rule 56 (e) of the Massachusetts Rules of Civil Procedure, 365 Mass. 824 (1974), requires that affidavits supporting and opposing summary judgment shall present information upon "personal knowledge," and that they "shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The problem for the plaintiffs is that Kara, in her later deposition, testified that she could not recall if Donna said to stop.[8] Because Kara and Margaret bore the burden of proof, the defendants relied on the plaintiffs' depositions admitting that they could not recall if Donna had said, "stop," to argue that the plaintiffs could not meet their burden of proof. A party seeking summary judgment may satisfy its burden of demonstrating the absence of triable issues, see Pederson v. Time, Inc., 404 Mass. 14, 17 (1989), by showing "that the party opposing the motion has no reasonable expectation of proving an essential element of [its] case." Kourouvacilis, 410 Mass. at 716. To defeat the defendants' motion, Kara and Margaret needed to offer

[8] At her deposition, Kara acknowledged that she had reread her declaration and did not say that it refreshed her recollection.

admissible evidence that Donna withdrew consent during the X-ray exam or evidence supporting a reasonable inference that she withdrew consent.

b. Credibility is for the trier of fact. As a general matter, in ruling on a motion for summary judgment, "[t]he court is not to pass on the credibility of the witnesses or on the weight of the evidence." Attorney Gen. v. Brown, 400 Mass. 826, 832 (1987). A motion judge is not free to determine that a nonmoving party's testimony is not to be believed. Attorney Gen. v. Bailey, 386 Mass. 367, 370 (1982) ("In considering a motion for summary judgment, the court does not 'pass upon the credibility of witnesses or the weight of the evidence [or] make [its] own decision of facts'"). Thus, in this case, to whatever degree the judge's allowance of the defendants' summary judgment motion rested upon his statement that "to the extent that the plaintiffs' case depends upon the credibility of their witnesses, the Court cannot assume that a jury would find them credible," it was in error. Indeed, we assume that facts set forth by the nonmoving party are true. See Patsos v. First Albany Corp., 433 Mass. 323, 324 (2001). At the same time, where the party with the burden of proof at trial provides unrebutted testimony, summary judgment for that party may still be precluded because credibility is for the fact finder and the fact finder is free to disbelieve the testimony. See Wilmington

Trust Co. v. Manufacturers Life Ins. Co., 624 F.2d 707, 709 (5th Cir. 1980) (where party moving for summary judgment bears burden of persuasion on factual issue and information bearing on that issue falls within their exclusive knowledge, "prospective impeachment of the movant's evidence, without more, can suffice to preclude summary judgment"); Rotondi v. Ocean Spray Cranberry Juice, Inc., 682 F. Supp. 397, 398 (N.D. Ill. 1988) ("where questions of fact turn exclusively on the credibility of a party who bears the burden of persuasion, . . . [t]o grant plaintiff's motion for summary judgment would be to usurp the factfinder's crucial role").

c. Deficient affidavits/evidence. The hospital submitted documents titled "Affidavit" from Bukuras and from David Seaver, the hospital's risk manager, addressing certain issues discussed below. The hospital acknowledges that the so-called "affidavits" are signed but do not contain the requisite attestation language. However, the plaintiffs did not move to strike the affidavits.[9] Therefore, the judge was permitted,

[9] Instead, the plaintiffs argued in a footnote in their reply to the hospital's opposition to the plaintiffs' motion to compel that the affidavits should be disregarded. The plaintiffs deposed Bukuras after the defendants filed her affidavit and did not identify any conflict with the statements in her affidavit. In addition, the summary judgment record included interrogatory responses attested to by Seaver that asserted peer review privilege and the plaintiffs had opportunity to depose Seaver.

though not required, to credit these defective affidavits. Patsos, 433 Mass. at 324 n.2 (summary judgment affidavit made entirely on information and belief could be considered in its entirety in absence of motion to strike); Sweda Int'l, Inc. v. Donut Maker, Inc., 13 Mass. App. Ct. 914 (1982) (in considering "affidavit" that failed to show affiant was competent to testify, judge was permitted, though not required, to overlook deficiencies).

2. Withdrawn consent battery. a. Standard of proof. "[M]edical treatment of a competent patient without [her] consent is said to be a battery."[10] Matter of Spring, 380 Mass. 629, 638 (1980). See Superintendent of Belchertown State Sch. v. Saikewicz, 373 Mass. 728, 745-746 (1977) (in Massachusetts there is "a general right in all persons to refuse medical treatment in appropriate circumstances" and that right extends to "an incompetent, as well as a competent, patient"). Although our courts have not previously considered a claim of battery on the basis of withdrawal of consent in the medical context, several other States have permitted such claims, adopting the two-prong test articulated in Mims v. Boland, 110 Ga. App. 477, 483-484 (1964). That court held that a medical provider could

[10] The plaintiffs argue the battery claim under both the theory of withdrawn consent and lack of informed consent. We reserve our discussion of lack of informed consent for later in this decision.

be liable for battery if a patient withdraws consent during a treatment in progress so long as the following conditions exist:

> "(1) The patient must act or use language which can be subject to no other inference and which must be unquestioned responses from a clear and rational mind. These actions and utterances of the patient must be such as to leave no room for doubt in the minds of reasonable men that in view of all the circumstances consent was actually withdrawn. (2) When medical treatments or examinations occurring with the patient's consent are proceeding in a manner requiring bodily contact by the physician with the patient and consent to the contact is revoked, it must be medically feasible for the doctor to desist in the treatment or examination at that point without the cessation being detrimental to the patient's health or life from a medical viewpoint."

Id. See Coulter v. Thomas, 33 S.W.3d 522, 524 (Ky. 2000); Yoder v. Cotton, 276 Neb. 954, 960 (2008); Hartman vs. LeCorps, Tenn. Ct. App., No. 89-188-II (Oct. 4, 1989); Pugsley v. Privette, 220 Va. 892, 899-900 (1980). Contrast Linog v. Yampolsky, 376 S.C. 182, 187 (2008).

We now hold that if a patient unambiguously withdraws consent after medical treatment has begun, and if it is medically feasible to discontinue treatment, continued treatment following such a withdrawal may give rise to a medical battery claim. Complaints of pain and discomfort are not sufficient. Yoder, 276 Neb. at 961 (where plaintiff complained of discomfort during exam but did not establish unequivocal withdrawal of consent, no battery claim lies). To withdraw consent, "[t]he patient must act or use language which can be subject to no

other inference" and "leave no room for doubt in the minds of reasonable [listeners] that in view of all the circumstances consent was actually withdrawn." Mims, 110 Ga. App. at 483. Here, a reasonable jury could find that saying stop or words to that effect, in the particular factual context at issue, was sufficient to withdraw consent. Hester v. Brown, 512 F. Supp. 2d 1228, 1232-1233 (M.D. Ala. 2007) (consent may be revoked at any time; plaintiff's battery claim against medical provider turns on whether she effectively revoked consent when she screamed for medical provider to stop inserting intravenous line); Pugsley, 220 Va. at 899-900 (affirming jury verdict on battery claim against surgeon where jury could have found patient revoked consent when she told him that she did not want to undergo surgery without presence of named second surgeon).[11]

We also conclude that consent to have one's body touched or positioned for an X-ray is not a matter beyond the common knowledge or experience of a layperson and does not require expert medical testimony. Nothing about an X-ray exam inherently raises the question whether cessation of treatment was feasible and the defendant technologists contend that they stopped the X-ray exam before completion, demonstrating that it was feasible to complete fewer X-rays. See Pitts v. Wingate at

[11] In some cases, whether cessation of treatment is feasible may require expert testimony.

Brighton, Inc., 82 Mass. App. Ct. 285, 289 (2012), quoting Bailey v. Cataldo Ambulance Serv., Inc., 64 Mass. App. Ct. 228, 236 n.6 (2005) ("where a determination of causation lies within 'general human knowledge and experience,' expert testimony is not required"); Montgomery v. Bazaz-Sehgal, 568 Pa. 574, 589-590 (2002) (during surgery on plaintiff's penis, doctor implanted prosthesis without consent; laypersons could comprehend, without assistance of expert, plaintiff's emotional damages; expert testimony was necessary to prove any physical injuries resulted from implantation of device).[12]

b. Evidence of withdrawn consent. Kara and Margaret assert that Donna withdrew her consent during the X-ray exam when she said, "stop." Viewing the evidence in the light most favorable to the plaintiffs, a jury could find that the X-ray technologist took the six X-rays ordered, but falsely told the plaintiffs that he stopped early, taking only five. From this, the jury could reasonably draw an inference that Donna said to stop, but that the X-ray technologists did not, falsely reporting otherwise to her waiting family who had been promised

[12] See also Shine v. Vega, 429 Mass. 456, 465-466 (1999) (medical professionals must respect refusal of treatment by patient who is capable of providing consent -- even in emergency and where treatment could be life-saving); Grabowski v. Quigley, 454 Pa. Super. 27, 34-37 (1996) (expert testimony is not necessary to prove battery where different surgeon performed surgery than surgeon to whom plaintiff consented).

the X-rays would stop if Donna asked, and who might have heard her say to stop, to allay the family's concerns and avoid liability. Indeed, the defendants admitted in response to the plaintiffs' motion for summary judgment that "[a] genuine issue of material fact exists regarding whether the x-rays were timely terminated." These disputes of material facts were sufficient to defeat summary judgment on the claim of battery.

In addition, a jury could find that there is documentary evidence demonstrating that Donna said to stop. Specifically, the plaintiffs rely on three aforementioned documents in the record: (1) Kara's August 5 e-mail summary; (2) the redacted family relations report; and (3) Kara's notes taken during a telephone call with Bukuras. There are, however, unresolved questions raised by the defendants about the admissibility of these documents.[13] Where the "proper disposition of the [summary judgment] motion depends on the admissibility of evidence, and admissibility depends, in turn, upon the resolution of questions of fact, the judge's decision should reflect that he or she has confronted and resolved those questions." Thorell v. ADAP,

[13] The defendants also assert that generally, when a patient asks for an X-ray exam to stop, technologists stop and assess the patient. The defendants further argue that the plaintiffs could not hear any conversations that occurred during the exam, nor did they speak to Donna about what transpired. However, we note again that the task of assessing witness credibility is one designated for the jury and cannot be resolved on a motion for summary judgment.

Inc., 58 Mass. App. Ct. 334, 340 (2003). Here, the judge should have, but did not, resolve the questions about the admissibility of these documents. And, although we have concluded that, even without this evidence, the defendants' motion for summary judgment on this claim should have been denied, because the evidentiary issues with respect to these three documents are likely to arise on remand, we address the matter now to the extent the record allows.[14]

Because Donna's "stop" statements are in the documents, we address them first. Donna's "stop" statements are not hearsay because their utterance has independent legal significance and a jury could find they provided notice to the defendants. See Commonwealth v. Fourteen Thousand Two Hundred Dollars, 421 Mass. 1, 5 (1995), quoting Liacos, Massachusetts Evidence 438 (6th ed. 1994) (out-of-court statement is not hearsay when it is "offered to prove that the person to whom it was addressed had notice or knowledge of the contents of the statement"); Charette v. Burke, 300 Mass. 279, 280-281 (1938) (father's command to child was "verbal act" and not hearsay). See also Mass. G. Evid. § 801(c) (2019). Donna's "stop" statements, as contained in the

[14] If evidentiary issues cannot be resolved prior to ruling on a motion for summary judgment because the admissibility of the evidence turns on questions of fact, the admissibility of the evidence should be assumed in favor of the nonmoving party because on summary judgment we consider the evidence in the light most favorable to the nonmoving party.

documents offered by the plaintiffs, would be admissible to prove notice of Donna's withdrawal of consent, as long as the documents reporting the statements are also independently admissible.[15] We turn now to the documents that report that Donna said "stop" or the like.

(i) August 5 e-mail summary and the family relations report. Kara's and Margaret's statements in the family relations report that Donna said "stop," or the equivalent, are potentially admissible as their past recollection recorded, or prior consistent statements. The fact that Kara's and Margaret's statements were recorded by the hospital rather than by Kara or Margaret is beside the point. The recollections were recorded. See Commonwealth v. Bookman, 386 Mass. 657, 663 (1982) (past recollection recorded may be in memorandum made or adopted by the witness).

To the extent the plaintiffs argue that the August 5 e-mail summary or the statements in the family relations report are admissible as a past recollection recorded, the judge must make a determination as to whether Kara's memory of the August 4 X-ray exam is insufficient to "testify fully and accurately." Mass. G. Evid. § 803(5) (2019) ("A previously recorded statement may be admissible if [i] the witness has insufficient memory to

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[15] "[E]xpressions and complaints of pain" are not hearsay. Bacon v. Charlton, 7 Cush. 581, 586 (1851).

testify fully and accurately, [ii] the witness had firsthand knowledge of the facts recorded, [iii] the witness can testify that the recorded statement was truthful when made, and, [iv] the witness made or adopted the recorded statement when the events were fresh in the witness's memory"). See Commonwealth v. Nolan, 427 Mass. 541, 544 (1998) (past recorded statement may be admitted even if witness has some memory of events about which they are testifying). It is difficult on this record to see how the plaintiffs could not meet this standard, but this is a determination for the judge in the first instance. On remand, the judge will have to determine whether Kara's August 5 e-mail summary or any part thereof is admissible.

To the extent the plaintiffs offer the family relations report as the hospital's business record or a statement of a party opponent, the judge must determine whether the report qualifies as such. See Beal Bank, SSB v. Eurich, 444 Mass. 813, 815 (2005), citing DiMarzo v. American Mut. Ins. Co., 389 Mass. 85, 105 (1983). See also Mass. G. Evid. § 803(b). This, too, is a determination for the judge on remand.

(ii) Kara's handwritten notes. This document requires a two-step analysis, first analyzing Bukuras's alleged statements and then analyzing Kara's out-of-court notes. As to Bukuras, a statement is not hearsay if it is "offered against an opposing party and . . . was made by the party's agent or employee on a

matter within the scope of that relationship and while it existed." Mass. G. Evid. § 801(d)(2)(D) (2019). Kara's handwritten notes contain statements that Bukuras made to Kara regarding Bukuras's investigation into Donna's X-ray exam, which Bukuras conducted within a week or two of Donna's death. In the notes, Kara writes that Bukuras (1) "acknowledged that [Donna] asked to stop," (2) the "exam could've been stopped," and (3) that the exam was "cut . . . short [but] not as short as it should've been." Bukuras made such statements while she was employed by the hospital, within the scope of her job as a member of the patient family relations department, and the plaintiffs offered the statements against the hospital. Accordingly, Bukuras's statements constitute statements of an opposing party and are not hearsay. See Mass. G. Evid. § 801(d)(2) (2019).[16] On the second step of the analysis, the plaintiffs can offer Kara's notes only if they can demonstrate that the notes are admissible as a past recollection recorded. As with Kara's August 5 e-mail summary, a determination of this issue will have to be made on remand.

[16] We acknowledge that other Massachusetts cases treat a party opponent's out-of-court statement as hearsay, subject to an exception. See Commonwealth v. DeBrosky, 363 Mass. 718, 724 (1973); Commonwealth v. McKay, 67 Mass. App. Ct. 396, 403 n.13 (2006).

If the judge finds that any of the three aforementioned documents is admissible, they amount to additional evidence with regard to the battery claim pursuant to a theory of withdrawn consent. Whether Donna said, "stop," whether the technologists stopped the exam prior to completion, and whether they could have stopped sooner than they did are genuine issues of material fact which must be determined by the trier of fact. Accordingly, we reverse so much of the summary judgment on count one that alleges battery under the theory of withdrawn consent.[17]

3. Intentional infliction of emotional distress suffered by Kara and Margaret.[18] The judge's conclusion that there was no evidence of extreme and outrageous conduct was based on the incorrect premise that the defendants stopped the X-ray exam early because of Donna's pain. Putting, as summary judgment

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[17] If the plaintiffs prevail on this claim at trial, the correct measure of damages must exclude any pain inherent in the X-ray exam in view of her health at the time prior to any withdrawal of consent, including returning Donna to her bed.

[18] To sustain a claim of intentional infliction of emotional distress, a plaintiff must prove "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous, was beyond all possible bounds of decency and was utterly intolerable in a civilized community; (3) that the actions of the defendant were the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe and of a nature that no reasonable man could be expected to endure it" (quotations and citations omitted). Agis v. Howard Johnson Co., 371 Mass. 140, 144-145 (1976).

requires, "as harsh a face on [the technologists'] actions . . . as the basic facts would reasonably allow," Richey v. American Auto. Ass'n, Inc., 380 Mass. 835, 839 (1980), on this record the plaintiffs have offered enough evidence to defeat summary judgment with respect to the claim for intentional infliction of emotional distress. Viewed in the light most favorable to the plaintiffs, a jury could find that the technologists understood Kara's and Margaret's concern, as family members, about Donna's extremely vulnerable state and then-current level of pain; the technologists denied their request to allow a family member to assist or remain in the room in order to minimize any additional pain Donna might experience during the X-ray exam; the technologists gave an assurance that they would stop if Donna asked; failed to stop despite a plea from Donna to stop; knew that Kara and Margaret waited outside the X-ray room and could hear Donna's screams of agony; returned Donna to a soiled bed; and lied about stopping the X-ray exam early in an apparent attempt to hide wrongdoing. These facts and circumstances, if proved, would permit the jury to find in favor of the plaintiffs on their claims of intentional infliction of emotional distress. Compare Simon v. Solomon, 385 Mass. 91, 95, 97 (1982) (upholding jury verdict because landlord's conduct showing continuing pattern of indifference to repeated flooding of tenant's apartment with raw sewage was extreme and outrageous); Boyle v.

Wenk, 378 Mass. 592, 593-595 (1979) (conduct of private investigator repeatedly harassing woman just released from hospital with newborn baby was extreme and outrageous); Agis v. Howard Johnson Co., 371 Mass. 140, 141-142 (1976) (complaint should not have been dismissed where it was alleged that defendant, which employed plaintiff as waitress, held meeting at which supervisor stated that someone had been stealing and that he would begin firing all waitresses, in alphabetical order, until identity of that person could be established; he then summarily fired plaintiff, as result of which she sustained emotional distress). Accordingly, we reverse the summary judgment on counts five and seven for intentional infliction of emotional distress.

4. Other claims based on withdrawn consent. To the extent the plaintiffs assert claims of breach of express warranty and violation of G. L. c. 111, § 70E, based on the withdrawal of consent, summary judgment is reversed because there are material disputes of fact as to whether Donna withdrew consent and whether the defendants then stopped the X-ray exam.

5. Other claims. a. Negligence-based claims and wrongful death. The plaintiffs also contend that the judge erred in granting the defendants' motion for summary judgment on the plaintiffs' negligence-based claims -- battery (lack of informed

consent), negligence, gross negligence, and conscious pain and suffering,[19] as well as the wrongful death claim.

(i) Medical battery (lack of informed consent), negligence, conscious pain and suffering, and gross negligence. Where a plaintiff makes a claim for medical battery under a lack of informed consent theory,[20] such conduct relates to the appropriate standard of care in the medical context and our courts "prefer to treat informed consent liability solely as an aspect of malpractice or negligence" (quotations omitted). Feeley v. Baer, 424 Mass. 875, 880 (1997) (O'Connor, J., concurring), quoting 1 F. Harper, F. James, & 0. Gray, Torts § 3.10, at 3:45-3:46 (3d ed. 1996). "To prevail on a claim of medical malpractice, a plaintiff must establish the applicable standard of care and demonstrate both that a defendant [health care provider] breached that standard, and that this breach caused the patient's harm." Palandjian v. Foster, 446 Mass. 100, 104 (2006). The standard of care is "what the average qualified [health care provider] would do in a particular

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[19] A health care provider may be held liable only for the pain and suffering that occurred as a result of their negligence. Matsuyama v. Birnbaum, 452 Mass. 1, 26 n.41 (2008).

[20] "The doctrine of informed consent has its foundations in the law of battery." Feeley v. Baer, 424 Mass. 875, 880 (1997) (O'Connor, J., concurring).

situation." Id. at 105. Expert testimony is generally required to prove medical malpractice. Id. at 105-106.[21]

The summary judgment record here contains no expert witness testimony on the issue of informed consent to the X-ray exam or that the X-ray exam was performed negligently. Instead, the plaintiffs assert that there is no need for an expert witness because there is sufficient evidence for the jury to determine the appropriate standard of care, such that expert testimony would have been redundant. We disagree.

The defendants' alleged negligence was not so obvious that it lay within the common knowledge of the jurors. See Haggerty v. McCarthy, 344 Mass. 136, 139 (1962). Donna was terminally ill and suffered from metastatic cancer, as well as several bone fractures. As the defendants asserted, how to properly conduct an X-ray exam on such a patient is not within the common knowledge of jurors. An expert witness would be needed to establish whether and how to move a patient in Donna's condition and how to position such a patient for multiple X-ray images. Moreover, the jurors would not be able to determine, without

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[21] "It is only in exceptional cases that a jury instructed by common knowledge and experience may without the aid of expert medical opinion determine whether the conduct of a [health care provider] toward a patient is violative of the special duty which the law imposes." Haggerty v. McCarthy, 344 Mass. 136, 139 (1962), quoting Bouffard v. Canby, 292 Mass. 305, 309 (1935).

expert testimony, whether the technologists' actions caused Donna to experience an undue amount of pain, as opposed to the existence of the cancer or the fractures, and what damages, if any, were caused by the defendants. See Held v. Bail, 28 Mass. App. Ct. 919, 921 (1989) ("if the causation question involves questions of medical science or technology, the jury requires the assistance of expert testimony"). Cf. Pitts, 82 Mass. App. Ct. at 290 ("No expert testimony is necessary for lay jurors to appreciate that allowing a nursing home patient to fall to the floor could cause a broken bone").

Without expert testimony, the plaintiffs' negligence-based claims, which include lack of informed consent battery, negligence, gross negligence, and conscious pain and suffering, fail.

(ii) Wrongful death. The plaintiffs' claims under the wrongful death statute also fail. "The wrongful death statute imposes liability on anyone who 'by his negligence causes the death of a person.'" Matsuyama v. Birnbaum, 452 Mass. 1, 20 (2008), quoting G. L. c. 229, § 2. See Correa v. Schoeck, 479 Mass. 686, 693 (2018) ("To prevail in [their] wrongful death suit, [the plaintiffs] must prove that the defendants were negligent"). The plaintiffs argue that the defendants' negligent performance of the X-ray exam hastened Donna's death, thereby causing her a loss of chance to survive, pursuant to

G. L. c. 229, § 2. See Renzi v. Paredes, 452 Mass. 38, 44-46 (2008). However, under the loss of chance doctrine, the plaintiffs were required to present expert testimony supporting such a claim. See Matsuyama, supra at 28 (calculating damages under loss of chance doctrine "is a matter beyond the average juror's ken; the evidence will necessarily come from experts"). The plaintiffs did not do so here.

In sum, the judge properly granted summary judgment on the plaintiffs' battery claim under the theory of lack of informed consent (count one), their other negligence claims (counts three, four, six), and their conscious pain and suffering, wrongful death, and gross negligence claims (counts ten, eleven, and twelve).[22]

b. Medical malpractice tribunal. Pursuant to G. L. c. 231, § 60B, "[e]very action for malpractice, error or mistake against a provider of health care shall be heard by a tribunal consisting of a single justice of the superior court, a [representative of the field of medicine in which the alleged malpractice occurred] and an attorney authorized to practice law in the commonwealth."[23] A provider of health care is defined in

[22] For the same reasons, to the extent the plaintiffs assert that their claims of breach of express warranty (count eight) and violation of G. L. c. 111, § 70E (count two), were based on acts of negligence, summary judgment was properly granted.

the statute and includes a hospital, but the statute does not specifically include radiology technologists. See G. L. c. 231, § 60B.[24]

After the medical malpractice tribunal ruled in favor of the defendants, the plaintiffs filed the statutorily required $6,000 bond to pursue their claims in the Superior Court. See G. L. c. 231, § 60B (where tribunal finds for defendant, "plaintiff may pursue the claim through the usual judicial process only upon filing bond in the amount of [$6,000] in the aggregate").

On appeal, the plaintiffs make two arguments concerning the tribunal. First, they argue that under G. L. c. 231, § 60B, the tribunal did not have jurisdiction to review the claims against the technologists, as radiology technologist is not an occupation listed within the statutory definition of health care provider. We need not decide this issue, however, as it is

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[23] At the tribunal hearing, the tribunal determines whether the plaintiff's offer of proof "if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result." G. L. c. 231, § 60B. See Polanco v. Sandor, 480 Mass. 1010, 1010 (2018).

[24] "[A] person, corporation, facility or institution licensed by the commonwealth to provide health care or professional services as a physician, hospital, clinic or nursing home, dentist, registered or licensed nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, social worker, or acupuncturist, or an officer, employee or agent thereof acting in the course and scope of his employment." G. L. c. 231, § 60B.

undisputed that the tribunal had jurisdiction over the hospital. See G. L. c. 231, § 60B (listing licensed hospital as within definition of health care provider). Therefore, the plaintiffs' singular $6,000 bond payment was proper as to their claims against the hospital and the tribunal's findings with regard to the technologists, whether proper or not, did not require an additional bond payment and thus caused the plaintiffs no prejudice.

Second, the plaintiffs argue that the tribunal's composition was improper because it contained a radiologist, instead of a radiology technologist. However, as the defendants correctly assert, the plaintiffs waived that argument by failing to raise it prior to the commencement of the tribunal. See Blood v. Lea, 403 Mass. 430, 435-436 (1988).

c. Discovery motions. The plaintiffs also assert several discovery issues. We review discovery rulings for abuse of discretion. See Buster v. George W. Moore, Inc., 438 Mass. 635, 653 (2003).

(i) Motion to compel production of hospital policies. On August 21, 2015, the plaintiffs served the hospital with requests for production of documents. Request no. 8 sought "[a]ll documents . . . concerning . . . the hospital's policies or procedures relating to patient care" from August 4, 2005, to August 21, 2015. In response to the plaintiffs' subsequent

motion to compel, the hospital stated it would produce the "[r]adiology department protocol/policies in effect on August 4, 2011." The judge denied the plaintiffs' motion to compel as to request no. 8 on February 23, 2016.

On October 6, 2017, the hospital, through its attorney, informed the plaintiffs that after due diligence, it was unable to locate any such policies.[25] On October 18, 2017, the plaintiffs again moved to compel the hospital to provide appropriate responses to the outstanding discovery requests. After hearing, the judge denied the plaintiffs' motion "based on the representations of defense counsel at the hearing which shall be binding, and which shall be observed in the future if it turns out that additional production is needed to conform to those representations."

The plaintiffs argue that the judge erred by denying their motion to compel. However, the plaintiffs failed to include the transcript from the relevant hearing, which contains defense counsel's representations upon which the judge relied as the basis for his denial. Therefore, we are unable to conduct a meaningful review of this claim. See Cameron v. Carelli, 39 Mass. App. Ct. 81, 84 (1995), quoting Shawmut Community Bank, N.A. v. Zagami, 30 Mass. App. Ct. 371, 372-373 (1991), S.C., 411

[25] However, on November 29, 2017, the hospital learned of two radiology policies and produced them to the plaintiffs.

Mass. 807 (1992) ("An appellant's obligation to include those parts of the trial transcript and copies of motions 'which are essential for review of the issues raised on appeal . . . is a fundamental and longstanding rule of appellate civil practice'").

(ii) Peer review privilege. In response to the plaintiffs' request for production of documents, the hospital claimed that portions of the family relations report and certain e-mail communications regarding the investigation into the X-ray exam at issue were privileged, pursuant to G. L. c. 111, §§ 203, 204, 205. Twice, the plaintiffs moved to compel the hospital to produce such documents. The judge denied both motions, determining, as to the first motion, that the requested material was protected by peer review privilege.[26]

General Laws c. 111, § 205 (b), protects "[i]nformation and records which are necessary to comply with risk management and quality assurance programs established by the board of registration in medicine and which are necessary to the work product of medical peer review committees." The party asserting privilege over such materials must demonstrate "(1) that the information and records sought are 'necessary to comply' with risk management and quality assurance programs established by

[26] The judge denied the plaintiffs' second motion on different grounds.

the board, and (2) that the information and records 'are necessary to the work product' of 'medical peer review committees'" (footnote omitted). Carr v. Howard, 426 Mass. 514, 522-523 (1998), quoting G. L. c. 111, § 205 (b). "The existence of a claimed privilege is essentially a question of fact for the trial judge." Miller v. Milton Hosp. & Med. Ctr., Inc. 54 Mass. App. Ct. 495, 498-499 (2002). Determining whether the privilege applies "turns on the way in which a document was created and the purpose for which it was used, not on its content." Id. at 499, quoting Carr, supra at 531.

On appeal, the plaintiffs argue that the judge erred in denying their motions seeking to compel production of six pages that were redacted from the family relations report and e-mails that the hospital claimed were protected by the peer review privilege. Specifically, the plaintiffs argue that the hospital's proof of the privilege failed because its "affidavits" did not contain an oath or attestation declaring that the statements made were true.[27] Both the Bukuras and Seaver affidavits confirmed that the documents the plaintiffs

[27] The plaintiffs also argue that the hospital failed to demonstrate that the materials did not fall within one of the exceptions to the privilege. However, the plaintiffs cite no authority supporting this proposition; thus, we deem it waived because it does not rise to the level of appellate argument. See Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 921 (1975); K.A. v. T.R., 86 Mass. App. Ct. 554, 567 (2014).

sought were created in connection with the investigation related to Donna's X-ray exam, and the Seaver affidavit stated that those documents were "reports and records" of a medical peer review committee under the relevant statutes and "therefore privileged." As explained supra, in the absence of a motion to strike, the judge could rely on the defective affidavits. See Carr, 426 Mass. at 525, quoting G. L. c. 111, § 205 (b) ("a hospital need only show that the information at issue is of a type that is generally used by [peer review] 'committees'"); Miller, 54 Mass. App. Ct. at 501 ("the applicability of the medical peer review privilege to particular documents frequently will be clear from the purpose for which, and process by which, the documents were prepared").

(iii) Spoliation of evidence. At a meeting on August 5, 2011, the plaintiffs reported their concerns about the August 4 X-ray exam to Eileen Molina, Stacey Bukuras, and Amanda Moment. Viewed in the light most favorable to the plaintiffs, Bukuras took notes during the meeting. The plaintiffs' statements are reflected in the family relations report, which Bukuras authored. On June 14, 2016, the plaintiffs moved to compel production of Bukuras's notes, among other documents, and for sanctions. After hearing, the judge found that the requested notes no longer existed and ordered the hospital to "produce all documents and information setting forth observations of what

occurred and was said in the presence of any of the plaintiffs." The defendants then produced a redacted version of the family relations report.

A judge may impose sanctions for the spoliation of evidence if a party "negligently or intentionally loses or destroys evidence that the [party] knows or reasonably should know might be relevant to a possible action." Scott v. Garfield, 454 Mass. 790, 798 (2009). See Kippenhan v. Chaulk Servs., Inc., 428 Mass. 124, 127 (1998) ("The threat of a lawsuit must be sufficiently apparent . . . that a reasonable person in the spoliator's position would realize, at the time of spoliation, the possible importance of the evidence to the resolution of the potential dispute"); Mass. G. Evid. § 1102 (2019).

On appeal, the plaintiffs argue that the hospital knew or should have known that Bukuras's notes would be relevant to subsequent litigation.[28,29] In her affidavit, Bukuras stated that

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[28] To the extent that the plaintiffs argue that the destruction of Bukuras's notes constitutes a violation of the hospital's statutory obligation to retain treatment records under G. L. c. 111, § 70, we disagree. As we have concluded, the notes Bukuras took during the August 5 meeting were part of the investigation into Donna's X-ray exam, which was conducted pursuant to the hospital's medical peer review obligations, and such notes are exempt from this statute. See G. L. c. 111, §§ 1, 70.

[29] The plaintiffs also argue that the judge found spoliation, ordered the hospital to "produce all documents and information setting forth observations of what occurred and was said in the presence of any of the plaintiffs" as a remedy for

it was her "custom and practice to destroy" handwritten notes after the relevant family relations report was written and that any notes she may have taken during the August 5 meeting were destroyed prior to the commencement of litigation.

We conclude that the judge did not abuse his discretion by denying the plaintiffs' motion for sanctions with regard to the spoliation issue. See Gath v. M/A-COM, Inc., 440 Mass. 482, 490-491 (2003). Even assuming spoliation, the plaintiffs did not demonstrate how the spoliation allegedly prejudiced them, nor what remedy was warranted. See Santiago v. Rich Prods. Corp., 92 Mass. App. Ct. 577, 582 (2017), quoting Keene v. Brigham & Women's Hosp., Inc., 439 Mass. 223, 235 (2003) ("As a general rule, a judge should impose the least severe sanction necessary to remedy the prejudice to the nonspoliating party"). The plaintiffs, as witnesses to the August 4 X-ray exam and attendees of the August 5 meeting, could testify to what occurred and what was discussed during the meeting.[30] Moreover,

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the resulting prejudice, and that the hospital still refused to produce certain relevant e-mails. This argument is unavailing, as the judge found neither that there was spoliation of the notes, nor that the plaintiffs were prejudiced.

[30] The plaintiffs also assert that Molina indicated that the technologists' conduct did not comport with the hospital's policies and practices, citing Kara's declaration for support. However, Kara also declared that Molina made such statements before Bukuras entered the room; therefore, if she is correct, Molina's statements could not have been memorialized in Bukuras's notes.

the plaintiffs deposed both Bukuras and Moment regarding the meeting.[31] In addition, the plaintiffs are free to argue that a trier-of-fact should hold the hospital's failure to retain Bukuras's notes against the hospital.

(iv) Motion for sanctions on motion to compel. Allowing the plaintiffs' motion to compel responses to their outstanding requests for admissions, the judge found that "[i]t is not likely that [the] defendants can truthfully deny all the requested facts" and ordered the hospital to comply with Superior Court Rule 30A and eliminate the boilerplate objections. The hospital complied with the judge's order and supplemented its responses. Almost two years later, the plaintiffs filed a motion for entry of contempt against the hospital and for award of sanctions pursuant to Mass. R. Civ. P. 37 (b) (2), as amended, 390 Mass. 1208 (1984), for violating Mass. R. Civ. P. 36, 365 Mass. 795 (1974).[32] The judge denied the plaintiffs' motion, stating: "Defendant did supplement answers to admissions and is not in contempt. The plaintiffs' disagreements with the [a]nswers just reflects, in large part,

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[31] The record contains only excerpts of Moment's and Bukuras's depositions.

[32] The requested sanctions included reimbursement of all costs and fees incurred by the plaintiffs, an order stating that all admission requests were deemed admitted, and entry of judgment in favor of the plaintiffs.

their own conclusions from documents that both sides have seen. No extreme accusations are warranted. Nor is further litigation over responses to written discovery." We discern no abuse of discretion in the judge's order denying sanctions on the motion to compel. See Campana v. Directors of the Mass. Hous. Fin. Agency, 399 Mass. 492, 503 (1987).[33]

6. Conclusion. The portion of the judgment that dismisses so much of count one that pleads a claim of battery under the theory of withdrawn consent, as well as counts five and seven for intentional infliction of emotional distress, is reversed. In all other respects, the judgment is affirmed, as are the orders on appeal.

So ordered.

[33] The plaintiffs' arguments regarding their claims for loss of consortium, and their argument regarding the "habit evidence" upon which the judge purportedly relied in his decision are unsupported by authority or factual analysis and do not rise to the level of reasoned appellate argument; thus, these arguments are also waived. See Mass. R. A. P. 16 (a) (4); K.A., 86 Mass. App. Ct. at 567 (court will not consider claims that "do not rise to the level of reasoned appellate argument as contemplated by [the rules]").