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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3783-14T1

ANTHONY ANNECHARICO,

Plaintiff-Appellant,

v.

TOWNSHIP OF HOWELL,

Defendant-Respondent.

Submitted July 20, 2016 – Decided January 11, 2017

Before Judges Leone and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3389-13.

Milstein, Weber & Collazo, P.A., attorneys for appellant (Richard J. Weber, on the brief).

Gilmore & Monahan, P.A., attorneys for respondent (Christen E. McCullough, on the brief).

The opinion of the court was delivered by

O'CONNOR, J.A.D.

In this personal injury action, plaintiff Anthony Annecharico appeals from a March 6, 2015 order denying his motion for reconsideration of a February 6, 2015 order. The

latter order granted defendant Township of Howell's motion for summary judgment and dismissed plaintiff's complaint with prejudice. After reviewing the record and applicable legal principles, we affirm.

I

Plaintiff alleges he was at his home in Howell Township when officers from the Howell Township Police Department arrived in response to a call there was an altercation between him and his adult son. The officers decided to arrest plaintiff, and one of the officers allegedly injured plaintiff's right shoulder while handcuffing him, causing a tear in his rotator cuff. Plaintiff contended the officer was negligent in the manner he handcuffed him.

In his deposition, plaintiff testified as follows. When he realized he might be arrested, plaintiff informed Office Michael Drumright, one of the three officers who responded to his home, that he had "limited flexibility" due to prior injuries and would require "an extra set of cuffs" if his hands were handcuffed behind his back. Drumright advised if plaintiff were arrested, Drumright would look into whether his hands could be positioned in front of his body.

Officer William Bommer, Jr., subsequently approached plaintiff, indicated he was going to be arrested, and told him

to turn around and place his hands behind his back. Drumright was present but did not suggest plaintiff be handcuffed with his hands in front of his body.

Plaintiff put his hands behind him as far as he could and Bommer succeeded in getting his left hand into one of the handcuffs. However, Bommer struggled to get plaintiff's right hand into the other handcuff that was a part of the same pair of handcuffs. Plaintiff advised Bommer he could not get his right arm around his back far enough to be handcuffed, and that Bommer was hurting him. Plaintiff did not advise Bommer what part of his body hurt, but at his deposition stated his left shoulder, arm, and elbow were causing him pain.

Drumright then suggested that, because he was being cooperative, plaintiff be handcuffed with his hands in front of him. Bommer declined on the ground he believed plaintiff was violent. Then, in an effort to create slack, Bommer linked a second pair of handcuffs to the first pair and again attempted to handcuff plaintiff's right hand. Plaintiff's right hand could not reach far enough around his back to be handcuffed to the second pair of handcuffs. Plaintiff claims he felt pain in his left arm and shoulder and advised Bommer he was hurting him as Bommer attempted to handcuff his right hand to the second pair.

Bommer then hitched a third pair of handcuffs to the second one and succeeded in handcuffing plaintiff's right hand. Although at his deposition plaintiff testified "it" hurt when Bommer succeeded in handcuffing his right hand, the record is not clear what was hurting plaintiff at that point. However, plaintiff did not tell the police he was feeling any pain, although he did advise them the handcuffs were tight. Bommer responded to this complaint by advising plaintiff he would be at the police station shortly.

Upon arriving at the police station, Bommer assisted plaintiff out of the patrol car. When Bommer opened the rear driver's side door, plaintiff told Bommer his left leg was injured and would not support him if he exited the left side of the car. Plaintiff asked to exit from the right side of the vehicle so he could use his right leg to support himself when he stepped out. Bommer ignored plaintiff and reached into the car, hooked his arm under plaintiff's left elbow, and yanked plaintiff out of the left side of the car. Plaintiff felt pain in his shoulder, complained to Bommer he was hurting him, and asked why Bommer needed to be so rough. It is not clear which shoulder was causing plaintiff pain. Bommer did not reply to plaintiff; after plaintiff was taken inside the station, the handcuffs behind his back were removed.

During discovery, plaintiff contended his left shoulder was injured by Bommer attempting to handcuff him; he did not assert this shoulder was injured by Bommer pulling him from the police car. Plaintiff did not obtain and serve defendant with an expert's report on the issue of liability.

After the discovery end date had passed, defendant filed a motion for summary judgment. For the purposes of its motion, defendant accepted as true plaintiff's version of the facts, contending even when viewing the facts in a light most favorable to plaintiff, see Rule 4:46-2, defendant was entitled to summary judgment as a matter of law. Defendant argued plaintiff's failure to serve it with a liability expert's report precluded him from calling such an expert at trial. Defendant contended that, in the absence of expert testimony to enlighten the jury about and how Bommer deviated from police practices and procedures, plaintiff could not make out a prima facie case.

In response to defendant's motion for summary judgment, plaintiff asserted for the first time he was injured either by Bommer attempting to handcuff him or by Bommer pulling him from the police car. Defendant did not object to the new argument. Instead, defendant asserted that, regardless of which of the two theories plaintiff advocated, he needed but did not have a liability expert witness to testify to what the standard of care

requires when a police officer handcuffs or removes an arrestee from a police vehicle.

The trial court considered both of plaintiff's theories and ultimately found plaintiff needed an expert to inform the jury about police practices and procedures and how Bommer deviated from those standards. The trial court also pointed out plaintiff did not have evidence pinpointing how he was actually injured, whether it was during the altercation with his son, when Bommer endeavored to handcuff him, or when Bommer pulled him from the police car.

On February 6, 2015, the court entered an order granting defendant's motion for summary judgment and dismissing plaintiff's complaint. On March 6, 2015, the court denied plaintiff's motion for reconsideration of the February 6, 2015 order. Although plaintiff failed to provide any basis for the court to reconsider the February 6, 2015 order in accordance with Rule 4:49-2,[1] the court nevertheless reconsidered

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[1] Rule 4:49-2 provides in pertinent part:

> Except as otherwise provided by R. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order . . . shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes

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plaintiff's substantive argument. However, the court arrived at the same conclusions it had when it granted defendant's motion for summary judgment on February 6, 2015.

II

On appeal, plaintiff contends the trial court erred when it determined he required expert testimony to establish the negligence of defendant's employee, Officer Bommer. Plaintiff admits he was "well aware that he could have secured the services of an expert witness," but maintains a jury can determine, without the benefit of expert testimony, that the manner in which Bommer handcuffed and pulled plaintiff from the police car was negligent. We disagree.

We review the trial court's grant of summary judgment de novo, employing the same standard used by the trial court. Davis v. Devereux Found., 209 N.J. 269, 286 (2012); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). If there are no material facts in dispute, we consider whether, viewing the undisputed facts in the light most favorable to the non-moving party, the moving party is nonetheless entitled to judgment as a matter of law. Agurto v. Guhr, 381 N.J. Super. 519, 525 (App. Div. 2005).

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> the court has overlooked or as to which it has erred.

"In general, expert testimony is required when 'a subject is so esoteric that jurors of common judgment and experience cannot form a valid conclusion.'" Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 450 (1993) (quoting Wyatt v. Wyatt, 217 N.J. Super. 580, 591 (App. Div. 1987)). In our view, the manner in which a police officer is to handcuff or remove an arrestee from a patrol car is outside the ken of the average juror. While there may be some factual situations where the officer's conduct was so unusual or extreme that jurors can, based upon their common knowledge, determine the officer's liability without the benefit of expert testimony, this is not one of those cases.

McKinney v. East Orange Mun. Corp., 284 N.J. Super. 639 (App. Div. 1995), informs our analysis. There, ten police officers executed a no-knock search warrant at the wrong location, storming into a home with guns drawn. Three of the residents were allegedly manhandled and abused by the officers during their search for drugs in the house. The residents of the home filed an action against the local municipality and one of the detectives under 42 U.S.C. § 1983; McKinney, supra, 284 N.J. Super at 643.

During the trial, the court barred plaintiffs from introducing expert testimony concerning how the police deviated

from police procedures and practices. The jury found in favor of defendants. The plaintiffs appealed and we reversed the trial court's ruling, observing:

> [W]e would venture to say that most citizens have never been the subject of a no-knock entry and have no personal knowledge of how the police should ordinarily thereafter conduct themselves vis-a-vis the occupants and the premises or of the variables that may properly govern police decision-making in this regard. Thus, plaintiffs' expert-witness proffer should have been accepted because it dealt with matters outside the average juror's ordinary experience and as to which expert testimony would have been helpful.
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> [Id. at 654.]

Similarly, here, the procedures and protocols an officer is to follow when handcuffing an arrestee are outside the average juror's ordinary experience. Most jurors do not know how an arrestee is to be handcuffed, including the circumstances under which an arrestee's hands can be positioned in front of him when handcuffed, or the action an officer must take when an arrestee complains a handcuff is causing pain. In addition, the variables an officer must consider when removing an arrestee from a car are not common knowledge, either.

We affirm the March 6, 2015 order denying plaintiff's motion for reconsideration for substantially the same reasons

expressed by the trial court in the oral decisions it expressed from the bench on February 6, 2015, and March 6, 2015.

Affirmed.