SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1123-17T1

ESTATE OF MIKE ALEXANDER
deceased, by LORRAINE ALEXANDER
as Executrix of the Estate; and
LORRAINE ALEXANDER, Individually,

Plaintiffs-Appellants,

v.

NORTHEAST SWEEPERS, CHRISTOPHER M. HACKETT, TRI-STATE EQUIPMENT REBUILDING, CRISDEL CONSTRUCTION, FERREIRA CONSTRUCTION, ATHEY PRODUCTION CORPORATION, NEW JERSEY TURNPIKE AUTHORITY, NEW JERSEY DEPARTMENT OF TRANSPORTATION, and NEW JERSEY STATE POLICE,

Defendants,

and

HAKS ENGINEERS, ARCHITECTS AND LAND SURVEYORS, PC and JOHNSON, MIRMIRAN & THOMPSON,

Defendants-Respondents.

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Argued telephonically March 14, 2018 –
Decided April 19, 2018

Before Judges Reisner, Hoffman, and Gilson.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-7229-14.

John M. Vlasac, Jr., argued the cause for appellants (Vlasac and Shmaruk, attorneys; John M. Vlasac, Jr., and Yelena Kofman-Delgado, on the brief).

Timothy K. Saia argued the cause for respondent HAKS, Engineers, Architects and Land Surveyors, PC (Morgan Melhuish Abrutyn, attorneys; Timothy K. Saia, of counsel and on the brief).

Dawn Attwood argued the cause for respondent Johnson, Mirmiran & Thompson, Inc. (Pashman Stein Walder Hayden, PC, attorneys; Dawn Attwood, on the brief).

PER CURIAM

On leave granted, plaintiffs appeal two orders dated August 4, 2017, granting motions to dismiss the claims against two defendants because plaintiffs failed to serve an affidavit of merit in accordance with N.J.S.A. 2A:53A-27. Plaintiffs also appeal from a September 15, 2017 order denying their motion for reconsideration. We are constrained to reverse and remand for further proceedings.

I.

This matter arises out of a fatal accident that occurred while a portion of the New Jersey Turnpike was being resurfaced. Michael Alexander was an employee of Crisdel Construction (Crisdel), which had been hired to resurface sections of the

Turnpike. On July 11, 2014, Alexander was killed when he was struck by a street sweeper, which was owned by co-defendant Northeast Sweepers.

The New Jersey Turnpike Authority (NJTA) had retained several contractors in connection with the project to resurface portions of the Turnpike. Crisdel was the general contractor for the project. NJTA retained defendant HAKS Engineers, Architects & Land Surveyors, PC (HAKS) to provide "professional services" for the project. The professional services included "engineering services covering all construction supervision of the [] construction work . . . ." More specifically, HAKS was to supervise all construction and "inspect[] all work" and "all construction materials used" to "ensure compliance with the Contract Plans and Specifications[.]"

As part of its contract, HAKS agreed to provide appropriate personnel for its responsibilities, including a "[p]roject [m]anager" and "[r]esident [e]ngineer." The project manager was required to be a professional engineer licensed in New Jersey. John Schweppenheiser, a HAKS employee, who is a licensed engineer, was the project manager for the Turnpike resurfacing project.[1]

[1] Plaintiffs alleged that Schweppenheiser held that role and we accept that allegation for purposes of this appeal, which is an appeal from an order of dismissal. See Green v. Morgan Props.,

The resident engineer was required to be either: (1) a licensed professional engineer, (2) a person with at least ten years of experience, including five as a full-time resident engineer, or (3) a transportation engineering technician, certified by the National Institute for Certification in Engineering Technologies (NICET). The resident engineer also needed to have successfully completed the Asphalt Concrete Paving Construction course administered by the New Jersey Society of Asphalt Technologies.

HAKS subcontracted the construction inspection services to defendant Johnson, Mirmiran & Thompson, Inc. (JMT). Thus, JMT supplied the resident engineer, James Edgar. Edgar was not a licensed engineer; rather, he was a transportation engineer technician, certified by NICET. JMT also supplied Lawrence Fink, a licensed engineer, to perform some supervisory functions on the Turnpike resurfacing project.

In October 2014, plaintiffs, who are the Estate of Alexander and his widow, filed a wrongful death complaint against a number of defendants, including Northeast Sweepers, the driver of the

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215 N.J. 431, 452 (2013) (explaining that on a motion to dismiss "the [c]ourt is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint[,]" rather, "plaintiffs are entitled to every reasonable inference of fact." (alterations in original) (citation omitted)).

street sweeper, NJTA, and Crisdel. In January 2016, plaintiffs amended their complaint to add claims against HAKS and JMT.

In their amended complaint, plaintiffs allege that HAKS and JMT "were responsible for the operation, design, control, supervision, maintenance, inspection and/or creation of a system of oversight with regard to the project . . . ." Plaintiffs then alleged that HAKS and JMT negligently supervised the project and that their negligence was the proximate cause of the street sweeper striking and killing Alexander. The case was assigned to Track II, as a personal injury case.

HAKS and JMT filed separate answers in April 2016. In its answer, HAKS demanded compliance with the affidavit of merit statute. JMT made no reference to the affidavit of merit statute in its answer, but it did assert a general affirmative defense of a failure to state a claim. Thereafter, HAKS and JMT participated in discovery and five case management conferences for over a year without raising the issue of an affidavit of merit. No party sought to have the case re-assigned to Track III, as a professional malpractice case. Thus, the court did not hold a Ferreira conference.[2]

[2] In Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144 (2003), our Supreme Court directed trial courts to hold a case management conference in malpractice actions before the deadline for filing

In June 2017, HAKS and JMT each filed motions to dismiss the claims against them for failure to serve an affidavit of merit. In response, plaintiffs asserted that they were not alleging professional malpractice against HAKS or JMT. Instead, plaintiffs contended that HAKS and JMT had committed "ordinary negligence."

The trial court heard oral arguments, and on August 4, 2017, the court issued orders dismissing the claims against HAKS and JMT due to plaintiffs' failure to submit an affidavit of merit. In a written opinion, the trial court reasoned that the negligence asserted by plaintiffs against HAKS and JMT was negligence in their professional capacities as engineers. In that regard, the trial court explained that it could not

> envision a scenario in which [plaintiffs] could successfully establish negligence without comparing [HAKS' and JMT's] conduct to that of other similarly situated professionals. Put differently once again, [HAKS and JMT] were clearly hired, as the contract makes clear, to fulfill professional engineering obligations. Any showing of a negligent deviation from those obligations would necessarily implicate professional negligence. Therefore, an affidavit of merit is required. As all parties agree that no affidavit of merit was ever served, the case against HAKS and JMT must be dismissed.

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affidavits of merit to discuss the requirements for serving such an affidavit and any related issues.

On August 22, 2017, plaintiffs filed a motion for reconsideration. In support of that motion, plaintiffs submitted two affidavits from professional engineers who plaintiffs had retained as experts. Both experts certified that the work performed by HAKS and JMT did not involve professional engineering services; rather, it involved "incident construction supervision services[.]" Plaintiffs' experts maintained that Edgar and Schweppenheiser were overseeing a construction project to ensure that the work and materials were in compliance with the contract specifications. The experts opined that Edgar was "negligent in the supervision of construction services and compliance with the Contract Specifications." Furthermore, the experts opined that Fink and Schweppenheiser were negligent in their supervision of Edgar.

After hearing oral argument, the trial court denied the motion for reconsideration in an order issued on September 15, 2017. On the record, the court explained that plaintiffs had presented nothing on their motion for reconsideration that convinced the court that it should reconsider and change its ruling dismissing the claims against HAKS and JMT for failure to submit an affidavit of merit.

We granted plaintiffs leave to appeal the interlocutory orders of August 4, 2017 and September 15, 2017.

II.

On appeal, plaintiffs' primary argument is that they were not required to serve an affidavit of merit because they were not asserting claims of professional malpractice or a deviation from the standard of care of an engineer. Instead, plaintiffs contend that they were asserting claims of ordinary negligence. Ancillary to that primary argument, plaintiffs make two additional arguments. They contend that the statute does not apply to HAKS and JMT, which are being sued under the doctrine of respondeat superior. Plaintiffs also assert that even if an affidavit of merit was required, defendant should be estopped from raising that defense.

The affidavit of merit statute provides that "[i]f the plaintiff fails to provide an affidavit or a statement in lieu thereof, . . . it shall be deemed a failure to state a cause of action." N.J.S.A. 2A:53A-29; Alan J. Cornblatt, PA v. Barow, 153 N.J. 218, 244 (1998). We use a de novo standard to review the dismissal of a complaint for failure to state a claim. Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005).

In reviewing a dismissal for failure to state a claim, our inquiry is focused on "examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). Thus,

we must "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim[.]" Ibid. (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)).

If the court is called on to address facts outside the pleadings, then the motion should be reviewed as a motion for summary judgment. R. 4:6-2; Lederman v. Prudential Life Ins. Co. of Am., 385 N.J. Super. 324, 380 (App. Div.), certif. denied, 188 N.J. 353 (2006). We review a grant of summary judgment de novo, applying the same standard as the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). Summary judgment shall be granted if, viewing the evidence in the light most favorable to the non-moving party, "there is no genuine issue as to any material fact challenged and [] the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

We begin our analysis with a discussion of the affidavit of merit statute and the distinction between claims that assert malpractice and claims that assert negligence, but do not require an affidavit of merit. Applying the law to the facts of this case, we are constrained to reverse the orders dismissing the claims against HAKS and JMT and remand for further proceedings.

We also analyze plaintiffs' arguments concerning respondeat superior and hold that those arguments have no merit. Finally, we discuss plaintiffs' contentions of estoppel and hold that the procedural history here does not support estopping HAKS or JMT from asserting the affidavit of merit requirement as a defense.

A. The Affidavit of Merit Statute

The affidavit of merit statute provides, in relevant part:

> In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his [or her] profession or occupation, the plaintiff shall, . . . provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices.
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> [N.J.S.A 2A:53A-27.]

An affidavit must be filed within sixty days of the filing of an answer. N.J.S.A. 2A:53A-27. If, however, an affidavit is provided after sixty days, but within 120 days after an answer is filed, the affidavit will be deemed timely, provided (1) leave to file is sought, and (2) good cause for the delay is established. Paragon Contractors, Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415, 422 (2010). The purpose of the statute is "to weed out frivolous

claims against licensed professionals early in the litigation process." Meehan v. Antonellis, 226 N.J. 216, 228 (2016).

"[S]ubmission of an appropriate affidavit of merit is considered an element of the claim." Ibid. Accordingly, if an affidavit is not provided within 120 days of the answer, the claims will generally be dismissed with prejudice. Paragon, 202 N.J. at 422 (citing Barow, 153 N.J. at 247).

Not every claim against a licensed person requires an affidavit of merit. A plaintiff does not need an affidavit if defendant's negligence is a matter of common knowledge. Palanque v. Lambert-Woolley, 168 N.J. 398, 406 (2001). The common knowledge doctrine applies where "jurors' common knowledge as lay persons is sufficient to enable them, using ordinary understanding and experience, to determine a defendant's negligence without the benefit of the specialized knowledge of experts." Hubbard v. Reed, 168 N.J. 387, 394 (2001) (quoting Estate of Chin v. St. Barnabas Med. Ctr., 160 N.J. 454, 469 (1999)). In addition, if a licensed person engages in actions or work outside of his or her licensed profession, then an affidavit may not be required. Murphy v. New Rd. Constr., 378 N.J. Super. 238, 242-43 (App. Div. 2005) (explaining that an architect who performs non-architectural work is not covered by the affidavit of merit statute).

Determining whether a matter alleges professional negligence, ordinary negligence, or work outside the licensed profession, demands scrutiny of the legal claims alleged. Couri v. Gardner, 173 N.J. 328, 340-41 (2002). A court must consider "whether a claim's underlying factual allegations require proof of a deviation from a professional standard of care," or ordinary negligence, as only the former claims require an affidavit of merit. Id. at 341. To make that determination, our Supreme Court has explained:

> There are three elements to consider when analyzing whether the [affidavit of merit] statute applies to a particular claim: (1) whether the action is for "damages for personal injuries, wrongful death or property damage" (nature of injury); (2) whether the action is for "malpractice or negligence" (cause of action); and (3) whether the "care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint . . . fell outside acceptable professional or occupational standards of practices" (standard of care).
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> [Id. at 334 (quoting N.J.S.A. 2A:53A-27).]

"It is not the label placed on the action that is pivotal, but the nature of the legal inquiry." Id. at 340. In some situations, identifying the nature of the legal inquiry will be a question of law that the court can make. Murphy, 378 N.J. Super. at 241. In other situations, however, the inquiry may involve factual findings as to whether the person who is alleged to have

acted negligently was acting outside the licensed profession. Id. at 241-43.

Here, plaintiffs assert that they are not claiming that HAKS or JMT deviated from an engineering standard of care; rather, they are asserting ordinary negligence. Moreover, plaintiffs claim that the primary negligent actor — Edgar — was not a licensed engineer. In that regard, plaintiffs assert that HAKS and JMT failed to ensure that Edgar complied with the job requirements of the resident engineer. They contend that Edgar breached his contractual duties to supervise the contractors and to ensure that all contractors complied with the contract specifications. Plaintiffs also contend that HAKS was negligent because Schweppenheiser failed to properly supervise Edgar.

To support those assertions, plaintiffs submitted two affidavits from engineers who certified that Edgar was not acting as an engineer. In opposition, HAKS and JMT contend that Edgar was under the supervision of Fink and Schweppenheiser, who were licensed engineers.

Whether Edgar was acting under the supervision of licensed engineers or acting in a non-engineering capacity is a question of fact that requires more development than exists in the current record. That question will require expert testimony to enable the finder of fact to fully assess Edgar's role. Thus, plaintiffs'

proposed experts should be deposed. While plaintiffs only submitted the expert reports with their motion for reconsideration, those reports can be considered because they are consistent with plaintiffs' opposition to the motion to dismiss.

Moreover, HAKS and JMT may choose to file responding expert reports. After a more complete record is developed, the question of Edgar's role may be appropriately subject to a future motion for summary judgment or possibly an N.J.R.E. 104 hearing, if the parties challenge the admissibility of any of the experts' proposed testimony. In addition, if plaintiffs are successful in maintaining that they are only claiming ordinary negligence, then at trial they will be limited to that theory. See Murphy, 378 N.J. Super. at 243 (noting that a plaintiff who does not produce an affidavit of merit will have "placed all his [or her] eggs in the ordinary negligence basket[.]").

On this appeal, we hold only that the parties need to be given a fuller opportunity to establish whether Edgar was acting in a non-engineering capacity. Accordingly, we reverse the orders dismissing the claims against HAKS and JMT and remand for further proceedings. Because we are remanding, we will also analyze plaintiffs' arguments concerning respondeat superior and estoppel.

B. Respondeat Superior

The affidavit of merit statute applies to "alleged act[s] of malpractice or negligence by a licensed person in his [or her] profession or occupation"; for all cases other than medical malpractice,

> the person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification[,] or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least five years.
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> [N.J.S.A. 2A:53A-27.]

In New Jersey, all engineers must be "duly licensed"; however, engineering corporations or firms may not be licensed. N.J.S.A. 45:8-27. Plaintiffs, therefore, argue that they do not need an affidavit of merit because they have not sued any individuals; rather, they have asserted claims against HAKS and JMT on the basis of respondeat superior.

We reject plaintiffs' attempt to evade the requirements of the affidavit of merit statute by suing only HAKS and JMT. We have previously held that plaintiffs who assert malpractice actions cannot avoid the requirements of the affidavit of merit statute by suing on a theory of vicarious liability. See McCormick v. State, 446 N.J. Super. 603, 614 (App. Div. 2016) (holding that

an injured plaintiff who alleges that he received inadequate medical care while housed in a government facility cannot avoid the obligations of serving an affidavit of merit by naming only the public entity and not suing the individual licensed professionals who provided the alleged inadequate care); Shamrock Lacrosse, Inc. v. Klehr, Harrison, Harvey, Branzburg & Ellers, LLP, 416 N.J. Super. 1, 21-27 (App. Div. 2010) (holding that a plaintiff, a patent holder, alleging it had been injured by various acts of legal malpractice by an attorney, could not avoid the affidavit of merit statute by suing the two law firms that had employed the lawyer whose negligent conduct was in question).

Accordingly, if on remand there is a determination that Edgar was acting under the direction and supervision of licensed engineering professionals and that the function he was performing was part of the practice of engineering, plaintiffs cannot contend that the affidavit of merit statute does not apply because they are only suing HAKS and JMT.

C. Estoppel of Defendants' Affidavit of Merit Defense

As noted earlier, in Ferreira the Supreme Court directed trial courts to conduct a

> case management conference . . . within ninety days of the service of an answer in all malpractice actions. . . . At the conference, the court will address all discovery issues, including whether an affidavit of merit has

> been served on defendant. . . . If no affidavit has been served, the court will remind the parties of their obligations under the statute and case law.
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> [Ferreira, 178 N.J. at 154-55.]

The Supreme Court has clarified that the "Ferreira conference was created to remind parties of their statutory obligations[,]" but the failure to hold such a conference does not "extend the legislatively prescribed [120-day] filing period. Thus, [the lack of a Ferreira conference] is not a tolling device." Paragon, 202 N.J. at 419.

The Supreme Court has also held that under certain circumstances, defendants can be equitably estopped from asserting the plaintiff's failure to file an affidavit of merit as a basis for dismissal. Knorr v. Smeal, 178 N.J. 169, 178 (2003). In Knorr, the Supreme Court estopped a doctor from raising the failure to file an affidavit of merit as grounds for dismissal of a plaintiff's medical malpractice complaint. The Court made that ruling because the doctor had engaged in fourteen months of discovery after the deadline for filing the affidavit had passed. Moreover, the doctor's delay prejudiced the plaintiff because the plaintiff had incurred "significant costs and emotional burden [] during fourteen months of discovery." Id. at 181.

In applying equitable estoppel, the court in Knorr explained:

> Estoppel is an equitable doctrine, founded in the fundamental duty of fair dealing imposed by law. The doctrine is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his [or her] detriment. . . . Estoppel, unlike waiver, requires the reliance of one party on another. In short, to establish equitable estoppel, plaintiffs must show that defendant engaged in conduct, either intentionally or under circumstances that induced reliance, and that plaintiffs acted or changed their position to their detriment.
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> [Id. at 178 (citations omitted).]

Here, plaintiffs contend that even if an affidavit of merit needed to be filed, HAKS and JMT should be estopped from asserting the lack of an affidavit as the basis for dismissal. We disagree because plaintiffs have not detrimentally relied on any delay by HAKS and JMT.

Unlike the plaintiff in Knorr, here plaintiffs do not contend that they did not know of the potential defense of an affidavit of merit. To the contrary, plaintiffs assert that they do not need an affidavit of merit. Indeed, after defendants filed their motion, plaintiffs did not seek an extension. Just as importantly, plaintiffs have represented that they cannot and will not file an affidavit claiming that HAKS or JMT deviated from the standard of care for licensed professional engineers. Consequently, plaintiffs cannot and do not claim detrimental reliance. Without

such detrimental reliance, equitable estoppel does not apply. Ibid.

In addition, unlike the defendant in Knorr, HAKS and JMT did not take actions that would induce reliance. In its answer, HAKS asserted that plaintiffs needed to file an affidavit of merit. Thereafter, the parties engaged in discovery. Most of plaintiffs' discovery efforts, however, were directed at other defendants. To the extent that HAKS and JMT were involved in discovery, it was plaintiffs seeking discovery from HAKS and JMT. Thus, plaintiffs did not detrimentally rely on HAKS and JMT in pursuing discovery. Indeed, as HAKS pointed out, had it not provided discovery to plaintiffs, plaintiffs might have had grounds for seeking an extension until that discovery was produced. See N.J.S.A. 2A:53A-28 (allowing plaintiff to provide a sworn statement in lieu of an affidavit of merit if defendant has failed to provide plaintiff with "records or information having a substantial bearing on preparation of the affidavit").

In summary, plaintiffs have not established a basis for equitable estoppel. Accordingly, if following further discovery on remand HAKS and JMT timely file an appropriate motion for dismissal or summary judgment for failure to file an affidavit of merit, they should not be estopped from making that argument on a more complete record.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION