SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3396-20

MARY MCLOUGHLIN,

Plaintiff-Appellant,

v.

NEW JERSEY AMERICAN WATER COMPANY, INC. and CRJ CONTRACTING CORP.,

Defendants-Respondents,

and

OCEAN GROVE CAMP MEETING ASSOCIATION,

Defendant/Third-Party Plaintiff,

v.

PAUL PASSANTE and KATHLEEN PASSANTE,

Third-Party Defendants.

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Submitted May 16, 2022 – Decided May 25, 2022

Before Judges Fasciale and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-0951-19.

Cellino Law, LLP, attorneys for the appellant (John H. Shields and Andrew Lavadera, on the briefs).

Marshall, Dennehey, Warner, Coleman & Goggin, attorneys for respondent New Jersey American Water Company, Inc. (Paul C. Johnson and Walter F. Kawalec, III, on the brief).

Koster, Brady & Nagler, LLP, attorneys for respondent CRJ Contracting Corp. (Martin Sullivan and Joseph F. Herbert, III, on the brief).

PER CURIAM

In this personal injury action, plaintiff Mary McLoughlin appeals from orders granting summary judgment to defendants New Jersey American Water Company, Inc. (NJAWC) and CRJ Contracting Corp. (CRJ). Plaintiff alleges she was injured when a water meter touchpad, installed by defendants in a sidewalk, moved and rotated, causing her to fall as she stepped on it. She argues the court erred by determining as a matter of fact the touchpad was installed correctly and that she required expert testimony to sustain her claim the touchpad constituted a dangerous condition. Based on our review of the record in light of the applicable legal principles, we affirm in part, reverse in part, and remand for further proceedings.

I.

Plaintiff filed a complaint alleging in pertinent part she suffered injuries when she tripped and fell while walking on a sidewalk in Ocean Grove.[1] Plaintiff alleged her fall was "caused by defendants[']s negligence by creating, allowing and permitting a dangerous condition [on the] sidewalk." Discovery revealed the alleged dangerous condition is a water meter touchpad plaintiff alleged was installed by defendants in the sidewalk.[2]

A touchpad is an antenna that permits water meter readers to electronically read water meters without opening water meter covers. Some touchpads are not operative and are referred to as blanks; they are small, flat, round plastic disks that are inserted into larger round metal meter pit covers. The touchpad plaintiff alleged caused her fall is a blank.

In her answers to interrogatories, plaintiff stated she "was caused to trip and fall crashing face down on to the sidewalk due to a round metal plate that had been placed into the sidewalk during on-going water main construction

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[1] We refer to the allegations in plaintiff's third amended complaint, which was the operative complaint before the court when it considered defendants' summary judgment motions.

[2] There is a dispute of fact as to whether NJAWC or CRJ installed the water meter touchpad. Resolution of that issue is not material to a disposition of the plaintiff's appeal. We therefore do not address it.

throughout the Ocean Grove area." At her deposition, plaintiff testified she fell because the touchpad—the "inner section" of the round metal meter cover plate—"moved and turned" when she stepped on it. Plaintiff's supervisor witnessed the fall and took a video of the touchpad immediately after the accident.

The video recording, which is included in the summary judgment record, shows a round metal plate in the sidewalk. At the center of the metal plate is a smaller round disk, which is described elsewhere in the discovery materials as the size of a dinner plate. The parties do not dispute that the smaller round disk is the water meter touchpad plaintiff claims caused her fall. The recording shows a person touching the plate and demonstrating that it moved from side-to-side, and it also rotated and spun around its center.

Defendants filed separate motions for summary judgment, arguing plaintiff lacked any evidence supporting her claim they installed the touchpad incorrectly and plaintiff's claim the touchpad constituted a dangerous condition was not supported by expert testimony. After hearing oral argument, the court determined plaintiff failed to present any evidence the touchpad was installed incorrectly. Based on that determination, the court made the affirmative finding the touchpad was installed correctly.

The court also found plaintiff failed to present sufficient evidence the touchpad constituted a dangerous condition because plaintiff's claim was unsupported by any expert testimony. The court also reasoned that plaintiff failed to present any evidence the touchpad "violate[d] any applicable statute, rule[,] or regulation."

The court entered orders granting defendants summary judgment. Plaintiff appealed from those orders.

II.

A reviewing court considers a "grant of summary judgment under the same standard that governs the [motion] court's determination." Goldhagen v. Pasmowitz, 247 N.J. 580, 593 (2021). This standard mandates the grant of summary judgment "if the pleadings, depositions, answers to interrogatories[,] and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); see also Goldhagen, 247 N.J. at 593.

Rule 4:46-2 requires that a motion for summary judgment be supported by a statement of material facts which "cit[es] to the portion of the motion record establishing [each] fact or demonstrating that [each fact] is uncontroverted." R.

4:46-2(a). "[A] party opposing a motion for summary judgment [must] 'file a responding statement either admitting or disputing each of the facts in the movant's statement.'" Claypotch v. Heller, Inc., 360 N.J. Super. 472, 488 (App. Div. 2003) (quoting R. 4:46-2(b)). "[A]ll material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact." R. 4:46-2(b).

In our review of a summary judgment record, we limit our findings of the undisputed facts to those presented in the statements of material facts submitted to the court in accordance with Rule 4:46-2(a) and (b), and we do not consider or rely on information, evidence, or purported facts that were not presented to the motion court in accordance with the Rule. See Kenney v. Meadowview Nursing & Convalescent Ctr., 308 N.J. Super. 565, 573 (App. Div. 1998) (refusing to consider "factual assertions in [the] appeal that were not properly included in the motion . . . for summary judgment below" pursuant to Rule 4:46-2). Here, determination of the undisputed material facts that is essential to a proper de novo review of the summary judgment record is hampered by the absence of the parties' Rule 4:46-2 from the appellate record. That is, although

the motion court referred to the numerous statements submitted pursuant to Rule 4:46-2, the parties have opted not to include any of those statements in the appendices on appeal.

Rule 2:6-1(a)(1)(I) requires that an appellant provide "such . . . parts of the record . . . as are essential to the proper consideration of the issues" in his or her appendix on appeal. Where a party does not include those parts of the record necessary for a determination of an issue raised on appeal as required by Rule 2:6-1(a)(1)(I), we may properly affirm the trial court's order. Soc'y Hill Condo. Ass'n v. Soc'y Hill Assocs., 347 N.J. Super. 163, 177-78 (App. Div. 2002).

As we will explain, rather than simply affirm the court's order based on the absence of an essential part of the summary judgment record, we have endeavored to address the merits of the parties' arguments on appeal based on the record presented. However, because the absence of the parties' Rule 4:46-2 statements renders it impossible to engage in the necessary de novo determination of the proffered facts that were submitted in support of, and in opposition to defendants' summary judgment motions, our review is necessarily limited.

The court granted summary judgment on plaintiff's claim her fall and injuries were proximately caused by the incorrect installation of the touchpad.

The court found plaintiff failed to present any "argument or evidence" establishing the touchpad was installed incorrectly and plaintiff did not "present[] an expert opinion indicating that the touchpad was incorrectly installed." Based on its findings the record was bereft of evidence the touchpad was installed incorrectly, the court found as fact the touchpad was installed correctly.

Plaintiff argues the court's finding the touchpad was installed correctly is not supported by the summary judgment record. She claims the video recording made immediately after her fall shows the touchpad "was loose and spinning." She argues that therefore there is a fact issue as to whether the touchpad was installed correctly, and the motion court erred by finding otherwise based on the summary judgment record.

A determination as to whether there is a genuine issue of material fact precluding a summary judgment award requires consideration of the parties' Rule 4:46-2 statements. It is in the moving party's Rule 4:46-2 statement that it is required to set forth the proffered facts, supported by citations to competent evidence, upon which the summary judgment motion is based. R. 4:46-2(a). The party opposing the motion must either admit or deny the proffered facts, or offer additional facts, all with citation to competent evidence, supporting the

opposition to the motion. R. 4:46-2(b). The court then must consider the competing submissions and determine the facts that are undisputed, whether the disputed facts are material, and whether the undisputed facts support a judgment in the moving party's favor as a matter of law. See, e.g., Claypotch, 360 N.J. Super. at 488.

In our de novo review of a summary judgment order, we are required to employ the same process and engage in the same analysis. See Goldhagen, 247 N.J. at 593. We are precluded from doing so here because of the absence from the appellate record of the parties' Rule 4:46-2 statements. That absence is of particular significance in our consideration of plaintiff's argument the court erred by finding the touchpad was installed correctly because, according to plaintiff, there is a fact issue as to whether that is the case. Of course, under the summary judgment procedure set forth in Rule 4:46-2, whether a fact issue exists may only be properly determined based on an analysis of the parties' Rule 4:46-2 statements. Claypotch, 360 N.J. Super. at 488. That analysis is not possible due to the lack of compliance with Rule 2:6-1(a)(1)(I), and, for that reason alone, we reject plaintiff's claim we should reverse the court's order granting defendants' motions for summary judgment on plaintiff's claim the touchpad was

negligently installed, and that the negligent installation proximately caused plaintiff's fall and injuries. Soc'y Hill Condo. Ass'n, 347 N.J. Super. at 177-78.

We also reject plaintiff's argument because the court's order granting summary judgment on the negligent installation claim is founded on an absence of evidence. In other words, the court's summary judgment award on the claim is based on plaintiff's failure to sustain her burden of presenting evidence the touchpad was installed incorrectly. As such, based on the parties' arguments on appeal and their citations to the record, we are able to discern whether plaintiff presented competent evidence supporting the claim even in the absence of the parties' Rule 4:46-2 statements.

We recognize plaintiff challenges the court's affirmative finding the touchpad was installed correctly, arguing the court made that determination "without citing [to] specific record evidence." In fact, the court found—for purposes of its determination of the summary judgment motions—the touchpad was installed correctly based solely on the absence of evidence it was installed incorrectly. We are not persuaded by the court's reasoning plaintiff's failure to present evidence establishing the touchpad was installed incorrectly required or permitted the conclusion the touchpad was installed correctly. In our view, plaintiff's failure to present evidence the touchpad was installed incorrectly

established only that plaintiff lacked evidence supporting its claim that negligent installation of the touchpad caused it to move and spin and thereby caused her fall and injuries. We therefore reject the court's finding the touchpad was installed correctly.

The court's erroneous finding of fact the touchpad was installed correctly does not require a reversal of the summary judgment order on plaintiff's negligent installation claim. See generally Hayes v. Delamotte, 231 N.J. 373, 387 (2018) ("[I]t is well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion" (quoting Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001))). Plaintiff's argument to the contrary ignores that the court's determination is based on her failure to present evidence the touchpad was installed incorrectly. It is plaintiff's burden to present evidence supporting its claim, see Buckelew v. Grossbard, 87 N.J. 512, 525 (1981) ("[O]rdinarly negligence must be proved and will never be presumed, . . . indeed there is a presumption against it, and . . . the burden of proving negligence is on the plaintiff."), and the court found no evidence submitted in opposition to defendants' summary judgment motions establishing, or creating a fact issue as to whether, the touchpad was installed incorrectly.

On appeal, plaintiff argues evidence—including the video recording taken just after plaintiff's fall—showing the touchpad moving from side-to-side and spinning established it was not correctly installed. However, plaintiff does not point to any evidence presented to the motion court: establishing the requirements or standards for proper installation of the touchpad; showing defendants breached those requirements or standards; demonstrating the condition of the touchpad when it was installed; or supporting a finding that incorrect installation was the cause of the movement and spinning of the touchpad plaintiff claims caused her fall. Plaintiff also did not offer any expert testimony concerning the standards or requirements for installation of the touchpad, opining it was installed improperly, or asserting improper installation caused the condition—the movement and spinning of the touchpad—plaintiff alleges caused her fall.

Plaintiff therefore failed to sustain her burden of presenting evidence the touchpad was installed improperly. Buckelew, 87 N.J. at 525. Even ignoring the absence of the Rule 4:46-2 statements from the appellate record, on appeal plaintiff does not point to any evidence supporting her claim the touchpad was installed incorrectly, and the mere fact the touchpad may have moved or spun when plaintiff stepped on it does not establish it was installed incorrectly. See,

e.g., Diamond v. N.J. Bell Tel. Co., 51 N.J. 594, 601 (1968) (explaining plaintiff alleging installation of underground conduit caused damage to sewer line that backed up causing damage to plaintiff's property has "to shoulder the burden of persuading a jury that negligent installation of [the] . . . conduit was to blame"). Although the court erred in finding the lack of evidence established the touchpad was installed correctly, plaintiff's failure to present evidence the touchpad was installed incorrectly supports the court's summary judgment award on the negligent installation claim. We therefore affirm the orders granting summary judgment on that claim.

Plaintiff also argues the court erred by granting summary judgment on her claim the touchpad constituted a dangerous condition. That claim is supported by evidence—plaintiff's testimony and the video recording—that the touchpad was loose, moved side-to-side, and rotated when she stepped on it thereby causing her fall and injuries. The court rejected the claim, however, finding expert opinion, which plaintiff lacked, was required to establish the touchpad constituted a dangerous condition.

In determining whether expert testimony is necessary, a court must consider "whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the

conduct of the [defendant] was reasonable." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 407 (2014) (alteration in original) (quoting Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982)). In some cases, the "jury is not competent to supply the standard by which to measure the defendant's conduct," and thus the plaintiff must establish the defendant's standard of care and breach of that standard by presenting expert testimony. Ibid. (quoting Sanzari v. Rosenfeld, 34 N.J. 128, 134-35 (1961)); see, e.g., id. at 408 (expert required to explain fire code provisions and standards); D'Alessandro v. Hartzel, 422 N.J. Super. 575, 582-83 (App. Div. 2011) (stating an expert is required to explain dangerous condition of a step down into a sunken living room near the entrance because allegations of a design flaw or construction defect are "so esoteric or specialized that jurors of common judgment and experiences cannot form a valid conclusion" (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 450 (1993))); Vander Groef v. Great Atl. & Pac. Tea Co., 32 N.J. Super. 365, 370 (App. Div. 1954) (plaintiff "failed to introduce any evidence that the construction of a platform [forty-four] inches high without steps or a ladder was in any way a deviation from standard construction, or that it was unsafe").

In contrast, where "a layperson's common knowledge is sufficient to permit a jury to find that the duty of care has been breached," an expert is not

required. Davis, 219 N.J. at 408 (quoting Giantonnio v. Taccard, 291 N.J. Super. 31, 43 (App. Div. 1996)). That is because "some hazards are relatively commonplace and ordinary and do not require the explanation of experts in order for their danger to be understood by average persons." Hopkins, 132 N.J. at 450 (stating an expert is not required to establish a dangerous condition of camouflaged step); see also Scully v. Fitzgerald, 179 N.J. 114, 127-28 (2004) (expert not required to explain danger of throwing a lit cigarette onto a pile of papers or other flammable material); Berger v. Shapiro, 30 N.J. 89, 101-02 (1959) (expert not required to explain dangerous condition caused by a missing brick in top step of a porch); Campbell v. Hastings, 348 N.J. Super. 264, 270-71 (App. Div. 2002) (expert not required to establish danger of unlit sunken foyer).

Measured against these principles, we are convinced a lay person serving as a juror is capable of determining, without the aid of expert testimony, that a touchpad which moves side-to-side and rotates when touched constitutes a dangerous condition when placed in, or maintained on, a sidewalk that is intended to provide a safe pathway for pedestrians. There is nothing esoteric about the placement or maintenance of a movable and spinning portion of a sidewalk that prevents a juror of common judgment and common sense from determining whether those responsible for it acted reasonably such that expert

testimony is required. See Davis, 219 N.J. at 407. The alleged dangerous condition—the moving and spinning touchpad—"[does] not require the explanation of experts in order for [its] danger to be understood by average persons." Hopkins, 132 N.J. at 450. A jury may determine the touchpad is not a dangerous condition, but that "is [its] decision to make, and [it is] fully capable of making that decision without the assistance of experts." Id. at 451. The motion court erred by concluding otherwise, and we therefore reverse the court's orders granting defendants summary judgment on the claim the touchpad constituted a dangerous condition.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.