RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-0217-21
A-0637-21

A.D., as guardian ad litem of C.S.,

Plaintiff-Respondent,

and

A.D., individually,

Plaintiff,

v.

RANNEY SCHOOL and JAMES PAROLINE,

Defendants-Respondents,

and

FIRST STUDENT, INC.,

Defendant-Appellant.

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Argued December 21, 2022 – Decided April 21, 2023

Before Judges Accurso, Vernoia and Firko.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-1067-19.

Gerald T. Ford argued the cause for appellant (Landman Corsi Ballaine & Ford, PC, attorneys; Gerald T. Ford and Preeya S. Varma, on the briefs).

Steven L. Kessel argued the cause for respondent A.D., as guardian ad litem of C.S. (Drazin & Warshaw, PC, attorneys; Steven L. Kessel, on the brief).

Jerald J. Howarth argued the cause for respondent Ranney School (Howarth & Associates, LLC, attorneys; Jerald J. Howarth, on the brief).

Wilentz, Goldman & Spitzer, PA, attorneys for respondent James Paroline, join in the briefs of appellant First Student, Inc., and respondent Ranney School.

PER CURIAM

Plaintiff, A.D., individually and as guardian ad litem of her child, C.S., filed a complaint against defendants Ranney School, James Paroline, and First Student, Inc. (First Student), alleging that on August 22, 2014, Paroline "committed an assault and a battery and sexually molested" then-four-year-old C.S. during the child's attendance at a Ranney School summer camp.[1] The

[1] This matter involves allegations of the sexual molestation of a juvenile. We therefore use initials to identify the alleged juvenile victim and the child's mother to protect the juvenile's privacy and because the identity of an alleged

complaint asserts Paroline was employed by Ranney School as a sports activity specialist at the summer camp and Ranney School negligently failed to supervise C.S., ensure C.S. got on the correct bus to return home, and account for C.S. during a two-hour period plaintiff claimed C.S. was "missing," thereby allowing C.S. to be in Paroline's presence when the alleged battery, assault, and sexual molestation occurred. The complaint alleges First Student provided bus transportation services to the summer camp attendees pursuant to a contract with Ranney School, and First Student negligently failed to transport C.S. home on August 22, 2014, thereby leaving C.S. in Paroline's presence when the alleged battery, assault, and sexual molestation occurred.

These consolidated appeals arise from Ranney School's and First Student's efforts to depose C.S. during pretrial discovery.[2] By leave granted, First Student appeals from a December 18, 2020 order granting plaintiff's motion for a

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juvenile victim of such conduct is not subject to public disclosure under Rule 3:18-3(a), -3(c)(9), and -3(d)(11); see also N.J.S.A. 2A:82-46.

[2] We note that although Ranney School and First Student challenge the trial court's orders granting plaintiff's motion for a protective order, denying First Student's motion for reconsideration of the protective order, and denying First Student's subsequent motion to vacate the protective order based on newly discovered evidence, the pending appeals are before the court by leave granted solely to First Student. Ranney School is therefore a respondent in the pending appeals.

protective order prohibiting defendants from taking C.S.'s deposition, barring C.S. from testifying at trial, and denying defendants' motions to compel C.S.'s deposition. First Student also appeals from a January 22, 2021 order denying defendants' motion for reconsideration of the court's December 18, 2020 order and from September 3, 2021 orders denying defendants' respective motions to vacate the December 18, 2020 protective order.

Based on our review of the record, the parties' arguments, and the applicable legal principles, we are convinced the plaintiff failed to present sufficient competent evidence supporting the court's entry of the December 18, 2020 protective order. We therefore reverse the protective order, as well as the orders denying defendants' motions for reconsideration and to vacate the protective order, and remand for further proceedings.

I.

Plaintiff alleges that on August 22, 2014, then-four-year-old C.S. attended a Ranney School summer camp. First Student supplied bus transportation from the camp to C.S.'s home pursuant to an arrangement between Ranney School and First Student.

According to plaintiff's allegations, on August 22, 2014, Ranney School negligently failed to take the steps necessary to ensure C.S. was placed on the

correct bus to transport the child home and First Student failed to ensure C.S. was on the correct bus and was returned home. When the bus did not deliver C.S. home as expected, there was an approximately two-hour period during which plaintiff did not know the child's location. Ultimately, C.S. was found at the summer camp in Paroline's presence.[3]

Plaintiff alleges that following the incident, C.S.'s behavior changed dramatically and there is circumstantial evidence Paroline sexually molested C.S. during the two-hour period C.S. was "missing." Defendants deny C.S. was the victim of an assault, battery, or sexual molestation or that C.S. was ever missing on August 22, 2014. They claim C.S.'s purported emotional distress damages sought in the pending lawsuit are the product of a series of developmental challenges confronting C.S. that were extant and documented well before August 22, 2014, and are unrelated to any events occurring that day.

[3] In plaintiff's merits brief, it is argued that during "[t]he summer following" the alleged August 22, 2014 incident, "Paroline was arrested and subsequently convicted of child pornography charges and admitted molesting other children at [the] Ranney" School. The assertion is unsupported by a citation to any competent evidence presented to the motion court, and we therefore disregard it, see R. 2:6-2(a)(5) (providing facts set forth in a brief on appeal must be "supported by references to the appendix and transcript"), and our review of the motion record reveals no competent evidence supporting plaintiff's claim.

It is against this backdrop, and plaintiff's asserted causes of action, that defendants sought C.S.'s deposition. Defendants claim C.S. is an essential witness to: what occurred on August 22, 2014; C.S.'s claimed emotional distress damages; and C.S.'s interactions with A.D. and others following the alleged incident that may have affected the child's recollection of the pertinent facts.

A. The December 18, 2020 Protective Order And Order Denying Defendants' Motion to Compel C.S.'s Deposition

Plaintiff refused to produce C.S. for deposition, claiming the child has no recollection of the August 22, 2014 incident. Plaintiff also suggested that as remedy for her refusal, the court could bar C.S. from testifying at trial. Ranney School moved pursuant to Rule 4:23-4 to compel C.S.'s deposition. First Student joined in Ranney School's motion.

In the certification supporting the motion to compel, Ranney School's counsel explained plaintiff had served an expert report from psychologist Dr. Eileen Kohutis, who opined "C.S. was traumatized and [the child's] 'behavior changed dramatically' after August 22, 2014" and who "interviewed several individuals who reported dramatic changes in [C.S.'s] behavior after August 22, 2014." Ranney School's counsel further certified plaintiff produced reports from other doctors who performed various evaluations of C.S., and counsel

acknowledged C.S. had diagnoses of autism spectrum disorder, attention deficit hyperactivity disorder, and anxiety for which the child had received various treatments and therapies.[4]

Counsel also noted C.S. is the focus of the claims asserted in the complaint, as well as Dr. Kohutis's report, and therefore defendants are entitled to depose C.S. regardless of the extent of the child's memory of the alleged incident. Counsel asserted defendants sought to depose C.S. concerning the alleged incident, the treatment C.S. has received, and the damages sought in the lawsuit. Counsel additionally claimed C.S.'s deposition was essential to a proper defense.

Plaintiff filed a cross-motion for an order "protecting C.S. from being compelled to submit to a deposition." Plaintiff supported the cross-motion with a certification from their counsel asserting it was counsel's "understand[ing]" C.S. "has no memory of the [alleged assault and molestation] and has never spoken of it to [the child's] parents or to any treating professional." Counsel further asserted "[p]laintiff's proofs that [the assault and sexual molestation]

[4] Attached to counsel's certification are copies of psychological evaluation reports from Dr. Kohutis and Dr. Cynthia R. Silverman.

occurred are based on circumstantial evidence that is not dependent on the child's testimony."

Counsel opined defendants were "likely motiv[ated]" to take C.S.'s deposition with "the expectation . . . the child will clam up," and counsel claimed Ranney School's counsel "conducted depositions in this case in a hectoring and aggressive manner and cannot be trusted to depose the child with the sensitivity such a proceeding requires." Plaintiff's counsel also cited a letter from C.S.'s treating doctor, Dr. Neelam K. Sell, M.D., noting that "[a]t the request of [C.S.'s] parent," it was Dr. Sell's opinion C.S.'s participation in a deposition "would be difficult for [the child] due to [C.S.'s] age and history of developmental disorders." In the letter, Dr. Sell opined the stress of a deposition "will exacerbate [C.S.'s] anxiety" and "[l]ess intrusive means of obtaining the information may be sought instead."

Plaintiff's counsel acknowledged defendants are entitled to a remedy if C.S. is not deposed and offered to stipulate C.S. would not be called as a witness at trial as that remedy. Counsel further asserted defendants have less intrusive means of obtaining the information they seek from the child, and the risk of causing C.S. emotional harm by taking the child's deposition outweighs any need for the information that might be gleaned from a deposition. Plaintiff's counsel

requested the court grant the cross-motion for a protective order barring the deposition "with the proviso that the child cannot be a witness at trial."

The cross-motion for a protective order was further supported by a certification, in the form of a letter, from plaintiff expressing "grave concern" a deposition would be "devastating" to C.S. because the child suffered from anxiety and suicidal ideation. Plaintiff further claimed C.S. could not "articulate anything about" the August 22, 2014 incident, which "happened when [C.S.] was approximately [four] years old and with a speech delay, history of hearing impairment, [a]utism [s]pectrum [d]isorder, and [attention deficit hyperactivity disorder] combined type." In part, plaintiff's concern about the deposition of C.S. was founded on her claim Ranney School's counsel's questioning style during her deposition constituted bullying, and similar questioning of C.S. would upset the child's "emotional well[-]being and stability."

The court did not hear oral argument on the motions, noting argument was not required because the motions were directed to pretrial discovery issues. R. 1:6-2(d). In its written decision on the motions, the court noted "the principle that pretrial discovery is afforded the broadest possible latitude," (citing Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 216 (App. Div. 1987)), but also cited two limitations on the manner and scope of discovery. The court

explained the first limitation is discovery sought must be relevant, see R. 4:10-2(a), and the second is the limitation set forth in Rule 4:10-3, which allows for an order limiting or barring discovery to protect a person "from annoyance, embarrassment, oppression, or undue burden or expense."

The court "presume[d] the questions" posed during a deposition of C.S. "would be of relevant matters." Indeed, the court noted "[t]he potentially relevant inquiries would be regarding the events" of August 22, 2014, "or the claimed damages." The court then found, apparently based on the representations in plaintiff's counsel's certification, plaintiff's letter, and plaintiff's expert's reports, that C.S. had no recollection of the alleged August 22, 2014 incident and would not provide testimony relevant to any damage claims because the child would not be able to "give a comparative analysis of [C.S.'s] behavior or alleged conditions resulting from the [alleged] incident at the current time as contrasted with those things prior thereto." The court reasoned that the remaining possible avenues of inquiry for a deposition of C.S. included only "the child's current status such as school, activities, hobbies, and the like."

In its analysis of plaintiff's entitlement to a protective order under Rule 4:10-3, the court rejected plaintiff's claim a protective order is required to

protect C.S. against what plaintiff characterized as Ranney School's counsel's aggressive and argumentative questioning during depositions. The court presumed all counsel would conduct themselves during any deposition of C.S. "in a professional and respectful manner." Thus, the court did not give any credence to plaintiff's claim a protective order was required under Rule 4:10-3 to protect C.S. from the questioning style of any counsel in the matter.

The court found "most significant" the opinion set forth in Dr. Sell's letter that C.S.'s participation in a deposition "would be difficult . . . due to [C.S.'s] age and history of developmental disorders," the stress of a deposition "will exacerbate [C.S.'s] anxiety," and "[l]ess intrusive means of obtaining the information may be sought instead." The court therefore concluded C.S. required protection from the deposition because the child was then ten years old, the August 22, 2014 incident is of a sensitive nature, and C.S. would be questioned on various topics beyond the occurrence of the alleged August 22, 2014 incident.

The court also reasoned that entry of a protective order barring C.S.'s deposition did "not mean there cannot be appropriate means of questioning to elicit" the information sought by defendants. The court noted defendants' experts would have an opportunity to question C.S. during their evaluations of

the child, and the experts could then testify at trial about what C.S. said. The court further explained that although "the usual case involves counsel's inquiry of [a] plaintiff," "this is not the usual case." The court found "[t]his is the rare exception where . . . an order that the child's deposition not be had is what 'justice requires to protect [the child].'" Thus, the court determined plaintiff established good cause under Rule 4:10-3(a) for a protective order barring C.S.'s deposition.

The court also found that "[i]n conjunction with granting the protective order, and as plaintiff acknowledges, . . . the child shall not be permitted to testify" at trial. The court's finding and determination constituted an apparent acceptance of plaintiff's counsel's suggestion, as set forth in counsel's supporting certification, that the remedy for plaintiff's refusal to produce C.S. for a deposition should be to prohibit C.S. from testifying at trial. The court's acceptance of plaintiff's suggested remedy ignored that defendants may want to call C.S. as a witness at trial, and the remedy suggested by plaintiff's counsel actually rewarded plaintiff's refusal to produce C.S. for a deposition because plaintiff does not want C.S. to testify.

The court entered a December 18, 2020 protective order barring defendants from deposing C.S. and barring C.S. from testifying at trial. The court's order also denied defendants' motion to compel C.S.'s deposition.

B. The January 22, 2021 Orders Denying Defendants' Reconsideration Motions

Ranney School moved for reconsideration of the court's December 18, 2020 orders, and First Student joined in the motion and filed exhibits, including medical records concerning C.S. Records from 2017 showed a doctor observed C.S.'s behavior and anxiety were continually improving, C.S.'s diagnosis "of autism was taken away by [a] developmental psychologist," and there were "no issues at school."

A December 2019 report from Dr. Sell submitted by defendants in support of the reconsideration motions noted C.S. was in third grade, had "made great progress with interventions," was "completing school[-]related tasks independently," was "usually in a good mood[,] and ha[d] no other behavioral concerns." Dr. Sell also reported C.S. continued to suffer anxiety, "usually related to when [C.S.'s] father leaves after visiting" or "about something such as getting sick." Dr. Sell further opined C.S.'s anxiety was "not causing functional impairments at this time."

The court did not hear argument on the motion, noting it was not required for motions related to pretrial discovery under Rule 1:6-2(d). In a written statement of reasons, the court restated the bases it articulated in support of its entry of the December 18, 2020 order. The court also rejected defendants' argument that it erred by relying primarily on Dr. Sell's letter as the basis for its entry of the protective order and by ignoring other records showing C.S.'s conditions have improved.

The court further reaffirmed its determination defendants would not suffer any prejudice if they did not take C.S.'s deposition because the parties' experts could question C.S. and obtain the necessary information from the child in a manner that would be least likely to cause C.S. any emotional distress or harm. The court entered a January 22, 2021 order denying the reconsideration motion.

C. The September 10, 2021 Order Denying Defendants' Motion To Vacate the December 18, 2020 Orders

Six months later, Ranney School's expert, psychologist and neuropsychologist Jonathan H. Mack, Psy.D., examined C.S. and rendered a report detailing the battery of psychological tests administered to C.S. by Dr. Mack's staff, as well as Dr. Mack's interviews of C.S. and plaintiff. Dr. Mack explained C.S. reported loving school and "get[ting] nervous but not often." Dr.

Mack further explained C.S. identified a "[n]umber one" fear "is probably buses," including "get[ting] left behind" by the bus, "and number [two] is people yelling at me, and number [three] is probably chemicals." Asked where the fear of buses came from, C.S. said "from when I was little and I did not make it home, and I don't remember a lot, but I remember I didn't make it home and that scared me."

Asked "what happened at the Ranney School," C.S. stated:

> what I remember I was on the bus and then I forgot to get off and it took me back, and I walked out, and somebody took me, and I was found with someone and then I went home . . . . I don't remember anything bad happening, but I remember it was scary . . . . It was very scary, and I didn't know where I was going, and I was lost.

C.S. also reported not having flashbacks, or "only [having] flashbacks of good memories." The child used fidget toys in some contexts, finding them helpful for anxiety. C.S. further explained that, at least at the time of the interview, plaintiff drove C.S. to school because of "[COVID-19] and plus [C.S. was] afraid of buses." C.S. reported speaking to plaintiff about the Ranney School incident "maybe six times a month" and that C.S. will "bring it up if [the child] get[s] scared" and "ask [plaintiff] if we ever have to take the bus again."

Based on the psychological tests they administered, Dr. Mack's staff reported C.S. "was friendly, pleasant, and polite, and rapport with the examiners was established, but [C.S.] was a little shy to warm up." C.S. was "initially calm and cooperative" but frequently "asked for breaks to either see [plaintiff] or use the bathroom." None of the individuals who administered the tests observed any "obvious indication of anxiety related to test performance," and they attributed C.S.'s "increasing difficulty with staying focused and staying seated" "as the testing days progressed" to C.S. getting "distracted by internal and external stimuli." C.S. "adequately managed . . . frustration during challenging tasks." C.S. was "friendly with a good sense of humor and cooperative" and "able to participate in conversations and respond meaningfully to the questions."

During plaintiff's interview with Dr. Mack, plaintiff described symptoms of autism in C.S. dating back to age two or younger and what plaintiff characterized as ongoing difficulties with learning and anxiety. According to plaintiff, C.S.'s anxiety "went right through the roof" after the incident at the Ranney School. Plaintiff described C.S.'s fearful or "delusion[al]" reactions to innocuous things, and an intense fear of buses. Plaintiff also reported C.S. had made progress and was "a rock star compared to where [the child] was," while accepting the child "has learning disorders." Plaintiff also noted C.S.'s

inappropriate touching of her "was an issue in 2017" but had likewise "significantly improved" since then.

Dr. Mack found C.S. "show[ed] no signs of anxiety or depression" with the caveats that C.S. "endorse[d] [having] had thoughts in the past of suicidal thoughts or self-harm[,]" and the child "may show emotional distress when routines are changed." Dr. Mack concluded that rather than evidencing anxiety, C.S.'s fears fit a "Specific Phobia" diagnosis and an autism-related tendency to hyper-fixate "in a highly perseverative way," which caused C.S. to "mirror" fears expressed by those around the child. Dr. Mack diagnosed C.S. with "Attention Deficit Hyperactivity Disorder, combined presentation, moderate to severe," "Executive Function Deficit," and "Developmental Coordination Disorder" with "residual features of Autism Spectrum Disorder." Dr. Mack opined there "is no indication that [C.S.] has Post[-]traumatic Stress Disorder, or signs of sexual abuse at this point." Dr. Mack concluded C.S. "is a young [child] with significant ongoing neurodevelopmental difficulties that have shown significant improvement over time."

In a letter dated August 24, 2021, Dr. Mack addressed C.S.'s participation in a deposition, opining that

> if [C.S.'s] mother is in the room, the depositions are sensitive to [the child's] developmental needs, breaks

> are provided as needed, and stopping for the day if [the child] becomes upset, that [C.S.] is more than capable of age-appropriate deposition testimony. To elaborate, age-appropriate testimony moving forward would mean that the questions are phrased in a manner and pace appropriate to [C.S.'s] age and neurodevelopmental levels as described in my report.
>
> . . . .
>
> Therefore, based on the totality of the evidence available to me at this time, it is my opinion that [C.S.] is capable of submitting to age-appropriate deposition testimony as long as the attorneys asking the questions go slowly, and ask concrete questions in a kind manner. Assuming the deposition is conducted in an age-appropriate manner, it is my opinion that this will not present any harm to [C.S.]. Again, if [C.S.] does become upset, I would immediately give [C.S.] a break, and if he does not recover during the break then I would cease the deposition for that day and reconsider.

In opposition to defendants' motions to vacate the December 18, 2020 orders, plaintiff submitted an updated letter from Dr. Sell stating a deposition would be "difficult" for C.S. and "exacerbate [the child's] anxiety." Plaintiff also submitted a certification in the form of a letter, as well as an August 31, 2021 letter from plaintiff's expert, Dr. Kohutis.

Dr. Kohutis did not find a deposition of C.S. would cause the child harm or exacerbate C.S.'s anxiety. Rather, Dr. Kohutis stated "[i]t is unknown how testifying at [a] deposition will affect C.S." Dr. Kohutis noted the challenges

presented during depositions of a child, explaining "rapport needs to be established before an interview can begin," common phrases in depositions such as, "[i]s it your testimony that . . . ," would likely not be understood by a child, and misunderstandings and leading questions can result in unreliable testimony. Dr. Kohutis also opined "[i]t would appear that there is sufficient information in" her and Dr. Mack's reports such "that [C.S.] does not need to be deposed."

Plaintiff's letter certification included disagreements with Dr. Mack's conclusions and offered the opinion C.S. showed signs of anxiety during and after the two days of psychological testing and examination by Dr. Mack and his staff. Plaintiff claimed that "[d]uring breaks, [C.S.] begged [plaintiff] to not go back, leave, quit, end the session, or hide." Plaintiff also expressed fear Ranney School's counsel would depose C.S. in an inappropriate manner, again claiming counsel had been "a bully during many of [the] depositions" taken in the matter.

The court conducted oral argument on the motions to vacate the December 18, 2020 orders and subsequently issued September 10, 2021 orders and written statements of reasons denying the motions. The court restated that "[m]ost significant to the court's decision" to enter the December 18, 2020 orders was the opinion provided in Dr. Sell's initial letter that the stress of a deposition will

"exacerbate" C.S.'s anxiety, and there appear to be less intrusive means — through questioning by the parties' respective psychological experts — to obtain the information sought by defendants.

The court also recognized defendants' motions to vacate presented an expert's opinion — Dr. Mack's — that conflicted with Dr. Sell's opinion, and the court stated it "is not taking sides on any dispute between the experts." However, the court then incongruously took plaintiff's expert's side in the dispute between the competing experts' opinions by finding Dr. Sell's initial letter opinion established C.S. would suffer harm — exacerbation of this anxiety — if the deposition is taken. The court did not consider that plaintiff's other expert, Dr. Kohutis, opined it is "unknown" how C.S. might be affected by a deposition.

The court concluded the conflict among the experts' opinions did not support the requested vacatur of the December 18, 2020 orders. The court further rejected defendants' claims C.S.'s statements to Dr. Mack concerning the child's recollections of the August 22, 2014 incident — including the child's recollections of being on the bus and forgetting to get off, and of being taken back to the Ranney School where "somebody took [the child]" — are "indicative of . . . substantive or other knowledge that would be the basis for the court to

reconsider its prior decision." The court reaffirmed its prior finding that defendants would not be deprived of any information from C.S. because they could rely on the questioning of C.S. during the psychological evaluations and examinations by the parties' experts.

We subsequently granted First Student's separate motions for leave to appeal from the court's orders, and we consolidated the appeals.

II.

"Broad discovery and liberal procedures for discovery . . . 'are essential to any modern judicial system in which the search for truth in aid of justice is paramount.'" Isetts v. Borough of Roseland, 364 N.J. Super. 247, 261 (App. Div. 2003) (quoting Lang v. Morgan's Home Equip. Corp., 6 N.J. 333, 338 (1951)). Thus, our "discovery rules are to be construed liberally in favor of broad pretrial discovery." Payton v. N.J. Tpk. Auth., 148 N.J. 524, 535 (1997).

"Indeed, 'our system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts.'" Lipsky v. N.J. Ass'n of Health Plans, Inc., 474 N.J. Super. 447, 463 (App. Div. 2023) (quoting Jenkins v. Rainner, 69 N.J. 50, 56 (1976)). Consistent with that commitment, Rule 4:10-2(a) provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence[.]
>
> [R. 4:10-2(a).]

"This discovery provision is part of our civil practice rules which recognize that '[l]iberal procedures for discovery in preparation for trial are essential to any modern judicial system . . . in which concealment and surprise are not to be tolerated.'" Shanley & Fisher, PC, 215 N.J. Super. at 215 (quoting Lang, 6 N.J. at 338).

A party's right to discovery, however, is "not unlimited." Trenton Renewable Power, LLC v. Denali Water Solutions, LLC, 470 N.J. Super. 218, 226 (App. Div. 2022) (quoting Piniero v. N.J. Div. of State Police, 404 N.J. Super. 194, 204 (App. Div. 2008)). Although a court faced with a challenge to a discovery request must "begin[] with the principle that pretrial discovery is afforded the broadest possible latitude and extends not only to relevant information but also to any information that might lead to the discovery of relevant information," Catalpa Inv. Grp., Inc. v. Franklin Twp. Zoning Bd. of Adj., 254 N.J. Super. 270, 273 (Law Div. 1991), Rule 4:10-3 provides that "a

party" may "for good cause shown" seek "any order justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." "[T]o overcome the presumption in favor of discoverability, a party" seeking a protective order under Rule 4:10-3 "must show 'good cause' for withholding relevant discovery." Cap. Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 80 (2017).

Where a party establishes good cause under Rule 4:10-3, a court must then determine whether: "discovery not be had," R. 4:10-3(a), "discovery may be had only on specified terms and conditions," R. 4:10-3(b), or "certain matters not be inquired into, or that the scope of the discovery be limited to certain matters," R. 4:10-3(d). "The limiting factors underlying Rule 4:10-3 must be weighed against the presumptively broad scope of discovery authorized in Rule 4:10-2 and other discovery provisions in our Rules of Court." Serrano v. Underground Utils. Corp., 407 N.J. Super. 253, 267 (App. Div. 2009). "[T]he movant bears the burden of persuading the court that good cause exists for issuing the protective order." Kerr v. Able Sanitary & Env't Servs., Inc., 295 N.J. Super. 147, 155 (App. Div. 1996).

We generally defer to a court's decision on a motion for a protective order under Rule 4:10-3 "absent an abuse of discretion or a judge's misunderstanding

or misapplication of the law." Cap. Health Sys., Inc., 230 N.J. at 79-80. A court abuses its discretion when its "decision [is] made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis." U.S. ex rel. U.S. Dep't of Agric. v. Scurry, 193 N.J. 492, 504 (2008) (citing Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

Measured against the foregoing principles, we find the court abused its discretion by entering the December 18, 2020 order barring C.S.'s deposition and the child's testimony at trial. We recognize "[t]he protection of children from undue trauma when testifying is an important public policy goal[,]" State v. T.E., 342 N.J. Super. 14, 30 (App. Div. 2001), but plaintiff did not present sufficient competent evidence to support the court's order depriving defendants of the broad discovery — C.S.'s deposition — to which they are entitled, see Kerr, 295 N.J. Super. at 155. Moreover, the court's decision is otherwise not grounded in an application of the correct legal standard.

As we have explained, defendants are entitled to broad factual discovery about all issues relevant to the claims in the complaint and any available defenses. Lipsky, 474 N.J. Super. at 463. In its analysis of plaintiff's motion for a protective order, the court correctly recognized a deposition of C.S. would yield information relevant to the claims and defenses in the pending matter, but

erroneously minimized the scope of the relevant information defendants might glean from the child during a deposition. In doing so, the court did not properly consider that an order barring defendants from taking C.S.'s deposition, and by further barring C.S. from testifying at trial, effectively precluded defendants from access to information relevant to the lawsuit's claims and defenses to which they are entitled under Rule 4:10-2(a) from an essential and wholly unique source — C.S. — the individual who was allegedly assaulted and molested and who has allegedly suffered damages as a result.

Plaintiff claims Ranney School and First Student negligently failed to ensure C.S. was properly transported home by bus from the summer camp, was missing for two hours, and was assaulted and sexually molested during that time. Plaintiff further asserts C.S. suffered emotional distress as result of the incident and continues to suffer emotional distress even after the many years since the alleged incident. Under any measure, C.S. is an essential witness to the events upon which plaintiff's claims are based and, under our broad discovery rules, defendants are vested with the right to explore the nature and extent of C.S.'s knowledge of relevant information under Rule 4:10-2(a).

We appreciate that C.S. was four years old when the alleged August 22, 2014 incident occurred and, due to the child's young age, the passage of time,

and any of the developmental disabilities from which it is alleged he suffers, the child's memories of the incident may be scant. But the nature and extent of C.S.'s memories of the event, and even a lack of any memory of the alleged event, are relevant and evidential if demonstrated during a deposition. Indeed, a lack of memory of the alleged August 22, 2014 assault and molestation may support defendants' claim the alleged incident did not occur in the first instance. See generally State v. Cabbell, 207 N.J. 311, 337 (2011) (quoting United States v. Owens, 484 U.S. 554, 559 (1988)) (observing questioning of a witness provides a party with "the opportunity to bring out such matters as the witness's bias, . . . lack of care and attentiveness, . . . poor eyesight, and even . . . the very fact that [the witness] has a bad memory.").

C.S. further possesses information concerning the alleged emotional distress damages, as reported by plaintiff and plaintiff's experts. C.S. also has knowledge about the discussions the child has had, and continues to have, with plaintiff and others, including the experts, concerning the alleged incident and the purported resultant emotional distress.

That information may support a claim or defense that plaintiff's or the expert's statements and comments to C.S. over the years concerning the alleged incident have influenced, shaped, or defined C.S.'s recollections and perceptions

of what occurred or did not occur on August 22, 2014, as well as any alleged resultant emotional distress. For example, in State v. Michaels, the Court explained in the context of a criminal case involving child-sexual-abuse victims that a trial court under appropriate circumstances must conduct a hearing to determine if police used improper interview techniques that "so infected the ability of the children to recall the alleged abusive events that their pretrial statements and in-court testimony based on that recollection are unreliable and should not be admitted into evidence." 136 N.J. 299, 315-16 (1994). We do not suggest such a hearing is required here, but the Court's concerns about the influence of post-incident communications with an alleged child victim of a sexual offense informs our determination that defendants are entitled to explore whether C.S.'s conversations with plaintiff or anyone else over the many years following the August 22, 2014 incident may have affected C.S.'s recollections, or absence of them, as well as the child's past and present claimed emotional distress.

Our observations concerning possible avenues of relevant inquiry about which C.S. may have knowledge is not intended to be exhaustive. We mention the areas of inquiry because they undermine the motion court's determination C.S. possesses so little information relevant to the claims and defenses in the

matter that barring C.S.'s deposition is appropriate under Rule 4:10-3(a). The court's determination precludes defendants' access to clearly relevant information to which they are entitled under our broad discovery rules. See Isetts, 364 N.J. Super. at 261.

The court also erred by concluding there is no need for C.S.'s deposition because the information known to C.S. can be effectively gleaned by the parties' respective psychological experts during their evaluations of the child. In other words, the court found defendants would suffer no prejudice in their ability to challenge plaintiff's claims and assert their own defenses because the parties' experts, and not their attorneys, could question C.S.

The court's reasoning ignores that the questions posed by the experts are for the purpose of assessing C.S.'s psychological status, issues, and treatment, and questions posed by counsel during a deposition are for the purpose of developing relevant evidence pertinent to the asserted causes of action and any available defenses. In addition, statements made during a psychological examination or evaluations are not made under oath.

In contrast, defendants sought an order allowing a deposition of C.S. under oath pursuant to our discovery rules, see R. 4:14-3(b) (requiring deposition witnesses testify under oath), by attorneys who possess skills — including

posing questions in an appropriate form seeking information relevant to the disposition of legal claims and defenses — necessary for the purpose of developing competent admissible evidence for trial. The court erred by finding a deposition of C.S. was not required in part because the parties' experts could effectively replace the parties' respective counsel in achieving the trial preparation and truth-seeking goals of our broad discovery rules. Plaintiff cites to neither evidence nor law supporting the notion, and the motion court's conclusion, that a party's right to question a witness under oath about relevant information may be circumvented or limited because the witness has been questioned in a wholly different context and in the absence of any oath by someone other than a party's counsel.

The motion court also incorrectly relied on inadmissible evidence in determining there was good cause to bar C.S.'s deposition under Rule 4:10-3(a). In its statement of reasons supporting entry of the December 18, 2020 protective order, the court found "most significant" Dr. Sell's letter stating a deposition of C.S. would exacerbate the child's anxiety. The letter, however, presented a purported fact upon which the court relied that was not properly presented in accordance with Rule 1:6-6. That is, there is no competent evidence C.S.'s reported anxiety would be exacerbated by participation in a deposition because

Dr. Sell did not submit an affidavit or certification to that effect as required by our Rules of Court. See R. 1:4-4; R. 1:6-6. As a result, there is no competent evidential support for what the court characterized as the most significant basis — Dr. Sell's statement a deposition would exacerbate C.S.'s anxiety — for the court's decision C.S.'s deposition should not be taken.

Plaintiff's December 7, 2020 letter certification supporting the motion for the protective order also did not include any competent evidence C.S. might be harmed by participating in a deposition. The letter includes opinions from an earnest and concerned mother, but none of plaintiff's opinions constitute competent evidence establishing a deposition will harm C.S. For example, plaintiff's letter opines C.S.'s "anxiety has escalated to where [the child] has had delusions and suicidal thoughts," and plaintiff expresses "grave concern that the anxiety and pressure to be deposed by a group of attorneys would be completely devastating . . . and could push [C.S.] toward having more suicidal ideas and potentially worse." Plaintiff's statements are opinions — diagnoses — that do not constitute admissible evidence because there is no showing plaintiff is qualified to offer them. See State v. Cotto, 471 N.J. Super. 489, 530 (App. Div. 2022) (quoting State v. Odom, 116 N.J. 65, 71 (1989)) (explaining an expert witness must be qualified and possess "sufficient specialized knowledge to be

able to express . . . an opinion and to explain the basis of that opinion"). Moreover, even if plaintiff was qualified to offer such opinions, they constitute inadmissible net opinions the court could not properly consider. See Townsend v. Pierre, 221 N.J. 36, 53-54 (2015) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)) ("The net opinion rule is a 'corollary of [N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'"); see also Randall v. State, 277 N.J. Super. 192, 198 (App. Div. 1994) (explaining an expert's net opinion does not constitute admissible evidence).

In addition to the court's erroneous findings of fact for which there is no competent evidence, the court did not apply the correct legal standard because it did not weigh "[t]he limiting factors underlying Rule 4:10-3 . . . against the presumptively broad scope of discovery authorized in Rule 4:10-2 and other discovery provisions in our Rules of Court." Serrano, 407 N.J. Super. at 267. Instead, the court simply reasoned defendants should be precluded from taking the deposition of a clearly essential witness based on vague assertions of putative harm, without regard to defendants' need for and right to obtain the information C.S. possesses, and without any consideration of whether there were other limitations that could be imposed to maximize the protection of the child

from any harm while, at the same time, providing defendants with the relevant information to which they are entitled under our discovery rules.

For those reasons, we reverse the courts' December 18, 2020 protective order barring defendants from taking C.S.'s deposition. We also reverse the court's order barring C.S. from testifying at trial. The court imposed that putative sanction at plaintiff's suggestion as a purported remedy for plaintiff's refusal to produce C.S. for deposition. In our view, it made little sense to impose that remedy here because the court otherwise found no discovery violation and entered the protective order under Rule 4:10-3. More importantly, the putative sanction constituted no sanction at all because plaintiff, the party refusing to produce C.S., does not want C.S. to testify at trial.

In any event, the motion court offered no reasoning supporting its decision barring C.S. from testifying at trial, see R. 1:7-4, defendants never moved to bar C.S. from testifying, plaintiff does not cite to any legal authority supporting the court's order, and the record presented does not otherwise permit such a limitation.[5] The court abused its discretion by concluding otherwise.

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[5] We note the Child Sexual Abuse Act (CSAA), N.J.S.A. 2A:61B-1, does not authorize a court to bar a child victim of sexual assault from testifying at trial as a means of insulating the child from "severe emotional or mental distress if required to testify in open court." N.J.S.A. 2A:61B-1(e)(1)-(2). Instead, the

We need not address the merits of defendants' challenge to the court's September 19, 2021 orders denying defendants' motions to vacate the December 18, 2020 order given our determination the December 18, 2020 order was entered in error in the first instance. We observe, however, that the record presented by defendants in support of their motions to vacate the December 18, 2020 order otherwise suggested a factual dispute over plaintiff's claim C.S. will suffer harm if a deposition is allowed, and defendants' claim that C.S.'s deposition may be taken without harm to the child by implementing appropriate conditions and precautions addressing C.S.'s needs as recommended by Dr. Mack.

The motion court dismissed the difference of opinions between the parties' experts, correctly stating it could not properly choose between the competing

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CSAA only authorizes the court to allow the child witness to testify "on closed circuit television, out of the view of the jury, defendant, or spectators, upon making findings . . . the victim is [sixteen] years of age or younger and that there is a substantial likelihood that the victim would suffer severe emotional or mental distress if required to testify in open court." Ibid. In A.B. v. Y.Z., the Court determined a trial court erred by allowing a victim to testify at trial via closed circuit television because the victim was over sixteen years of age and therefore did not qualify under the CSAA to testify in that manner at trial. 184 N.J. 599, 603-04 (2005). In making its determination, the Court noted "[n]o alternative legal basis was advanced by plaintiffs as a source of the judge's power to authorize closed circuit television." Ibid. So too here, plaintiff offers no legal basis supporting the court's order barring C.S. from testifying at trial.

opinions in the absence of a hearing. The court then incorrectly accepted plaintiff's expert, Dr. Sell's, terse opinion that a deposition will exacerbate C.S.'s anxiety. Our reversal of the court's December 18, 2020 order does not preclude the court from imposing appropriate conditions for C.S.'s deposition under Rule 4:10-3(b) grounded in competent evidence.[6] And, throughout the process, defendants have consistently expressed a willingness to accept conditions for C.S.'s deposition consistent with this age and any developmental issues, and the court is otherwise permitted to impose such conditions under Rule 4:10-3(b).

As we have observed in another context, "presentation of testimony of a child-witness requires sensitivity," N.J. Div. of Child Prot. & Permanency v.

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[6] Our decision also does not preclude plaintiff from arguing that although the complaint does not assert a cause of action under the CSAA, the statute otherwise authorizes the court to allow C.S. to testify via closed circuit television at trial in accordance with the statute. See A.B., 184 N.J. at 603-04 (explaining standards and requirements for allowing an alleged victim of sexual abuse to testify at trial via closed circuit television under the Child Sexual Abuse Act). In that regard we note in Hardwicke v. American Boychoir School, the Court held that the CSAA's tolling provision, N.J.S.A. 2A:61B-1(b), applies not only to actions brought under the statute, but also to common-law sexual assault claims. 188 N.J. 69, 100 (2006). The court reasoned that, "[b]y its literal terms, section [1(b)] applies to 'any civil action . . . based on sexual abuse.'" Ibid. We offer no opinion on the issue, and nothing in this opinion shall be construed as an expressing an opinion on the issue. The issue was not raised before the motion court. However, we do not preclude the parties from arguing on remand that subsections 1(e)(1)-(5) apply to plaintiff's causes of action and thereby permit use of the closed circuit process authorized under the statute at trial.

C.W., 435 N.J. Super. 130, 144 (App. Div. 2014), and therefore trial courts may properly "craft procedures acceptable to the parties to assure the child is not subjected to badgering or harshness," ibid. Similarly, in T.E., we discussed procedures that may be properly employed at a criminal trial to minimize the effects a four-year-old witness might suffer from testifying at trial. 342 N.J. Super. at 29-31. We affirmed a trial court order permitting the child-victim's therapist to sit next to the child while the child testified at trial, finding the procedure was appropriate after a preliminary showing established "a substantial need for the procedure[,]" meaning "that without accompaniment, the child is likely to be substantially non-responsive, and that with accompaniment, the child is likely to provide meaningful, probative testimony." Id. at 33.

In any event, although focused on a child's testimony at trial, our decisions in C.W. and T.E. are pertinent here because they establish a court may impose such conditions as are appropriate to balance the public policy goal of treating child victims and witnesses with the sensitivity and understanding they rightly deserve while, at the same time, affording defendants in civil cases the opportunity to appropriately question a witness providing testimony against them. Here, our reversal of the court's orders does not preclude the court from considering any evidence presented by the parties supporting the imposition of

appropriate conditions under which C.S.'s deposition shall be taken to lessen and minimize the impact of the process and the questioning on the child. The court shall make findings of fact and conclusions of law supporting any conditions imposed, R. 1:7-4, and shall conduct a hearing to the extent required to address any relevant factual issues presented.

Based on our reversal of the court's orders for the reasons stated, it is unnecessary to address defendants' claims the orders violated their right to due process. See State ex rel. A.R., 234 N.J. 82, 97 (2018) (alteration in original) (quoting Randolph Town Ctr., LP v. Cnty. of Morris, 186 N.J. 78, 80 (2006)) (explaining "[c]ourts should not reach a constitutional question unless its resolution is imperative to the disposition of litigation").

Reversed and remanded. We do not retain jurisdiction.