SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2233-21

SHIRLEY SMITH,

Plaintiff-Appellant,

v.

ELITE SPINE AND SPORTS CARE OF TOTOWA, LLC, JAE SOOK HA, and ESTATE OF JAE SOOK HA,

Defendants-Respondents.

———————————————————

Argued May 3, 2023 – Decided June 30, 2023

Before Judges Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-2362-19.

Glenn T. Praschil argued the cause for appellant (Vivino & Vivino, LLC, attorneys; Glenn T. Praschil, on the brief).

Ryan A. Notarangelo argued the cause for respondent Elite Spine and Sports Care of Totowa, LLC (Dughi, Hewit & Domalewski, attorneys; Ryan A. Notarangelo, of counsel and on the brief).

PER CURIAM

Plaintiff Shirley Smith appeals from the October 22, 2021 orders dismissing her complaint against defendants Elite Spine and Sports Care of Totowa (Elite), Jae Sook Ha, and the Estate of Jae Sook Ha (Estate).[1] She also challenges a March 14, 2022 order denying her motion for reconsideration of the October 22 orders. We affirm.

I.

On March 30, 2018, plaintiff sought treatment at Elite from Ha, a licensed acupuncturist and massage therapist, to alleviate pain in her shoulder and back. Ha utilized cupping and acupuncture therapy to treat plaintiff that day, placing cups on one of her arms, and needles on her back, before leaving the exam room. Plaintiff felt discomfort at the cupping sites and called out for help, but no one responded. When Ha returned to the exam room approximately thirty minutes later, plaintiff complained of pain in her arm at the cupping sites. Shortly thereafter, she went to a clinic to treat the blisters and burns she sustained during the incident.

[1] Jae Sook Ha passed away while plaintiff's action was pending. Therefore, in December 2020, plaintiff amended her complaint to include the Estate of Jae Sook Ha as a defendant.

In July 2019, plaintiff filed a complaint against Elite and Ha, alleging Ha negligently performed the March 30 cupping procedure and committed professional negligence while doing so, causing her to suffer "severe and permanent marks, swelling, burns, blisters and skin" discoloration. She further alleged Elite, as Ha's employer, was vicariously liable for her injuries.

Elite and Ha answered the complaint in September 2019. Two months later, the trial court entered an order stating plaintiff was not required to file an Affidavit of Merit (AOM) under N.J.S.A. 2A:53A-27,[2] because the statute did not apply to acupuncturists and massage therapists.

In January 2020, plaintiff served defendants with an expert report from Sheila A. Bond, M.D. The report addressed the damages plaintiff sustained during the March 2018 incident, but it did not identify the standard of care defendants owed plaintiff, nor how they deviated from that standard. Discovery ended in November 2020 without plaintiff seeking an extension of the discovery end date to supplement Dr. Bond's report.

The matter was initially scheduled for trial in March 2021. However, the trial was adjourned to a date in May 2021, based on the ongoing COVID-19

[2] The AOM statute requires a plaintiff who alleges professional negligence against a licensed person, as listed in the statute, to provide an expert's affirmation that the action has merit. N.J.S.A. 2A:53A-27.

pandemic, and adjourned again for the same reason to October 4, 2021.

In September 2021, Elite and the Estate separately moved to dismiss plaintiff's complaint based on her failure to provide an expert report addressing defendants' purported deviation from the applicable standard of care. Approximately two weeks after defendants filed their motions, the October 2021 trial date was adjourned to April 4, 2022, again due to the pandemic.

On October 22, 2021, the trial court heard argument on defendants' dismissal motions. In opposing the motions, plaintiff argued that given the nature of her injuries, the negligence issues to be addressed were matters of common knowledge, allowing a jury to evaluate the pertinent standards of care and issues of liability without any expert testimony on these issues.

The judge disagreed. He found plaintiff could not prove her case without expert opinion to establish the standard of care defendants owed to her and how they deviated from that standard. The judge reasoned an ordinary juror would not know what a proper cupping procedure entailed, or how Ha deviated from the standard of care owed when performing the procedure. He further explained an ordinary juror would not know, without expert testimony, whether the cupping procedure Ha used caused the cups to be "too hot . . . [or the cups were] on far too long, or . . . both," or whether Ha was supposed to be "the sole

administering individual for the entire procedure, so there's not . . . a nurse that's responsible for timing it or an assistant or a technician."

Additionally, the judge rejected plaintiff's contention that under Rule 4:46-1, defendants' dismissal motions were untimely filed.[3] The judge found that, contrary to plaintiff's argument, the existing trial date of April 4, 2022, not the initial trial date, governed his analysis. On that basis, he concluded defendants' motions were timely filed. Therefore, he granted the motions and dismissed plaintiff's complaint.

Plaintiff moved for reconsideration, and on March 14, 2022, the judge entered an order denying the motion. In a concise written opinion accompanying the order, the judge stated he previously found "an expert was needed to establish the standard of care and the motions were not untimely. This was not a decision that was [palpably] incorrect or irrational nor was it a clear abuse of discretion based on plainly incorrect reasoning or a failure to consider evidence."

---

[3] "When granting a motion that will result in the dismissal of a plaintiff's case . . . , the motion is subject to Rule 4:46, the rule that governs summary judgment motions." Seoung Ouk Cho v. Trinitas Reg'l Med. Ctr., 443 N.J. Super. 461, 471 (App. Div. 2015). Notably, Rule 4:46-1 states "[a]ll motions for summary judgment shall be returnable no later than [thirty] days before the scheduled trial date, unless the court otherwise orders for good cause shown."

II.

On appeal, plaintiff argues the judge erred in dismissing her complaint because expert testimony was not required to prevail on her ordinary and professional negligence claims. She also contends the trial court erred in denying her reconsideration motion. However, given our recent holding in Hoelz v. Bowers, 473 N.J. Super. 42, 51-52 (App. Div. 2022), plaintiff no longer contests the timeliness of defendants' dismissal motions.

We begin with a discussion of the principles guiding our review. We use a de novo standard to review whether a complaint was properly dismissed. Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005). Under Rule 4:6-2(e), a complaint can be dismissed if the facts alleged in the complaint do not state a viable claim as a matter of law.[4] Further, dismissal is appropriate when no rational jury could conclude from the evidence that an essential element of plaintiff's case is present. See Pitts v. Newark Bd. of Educ., 337 N.J. Super. 331, 340 (App. Div. 2001).

When a trial court considers a dismissal motion under Rule 4:6-2(e) and must address facts outside the pleadings, "the motion shall be treated as one for

[4] A motion to dismiss under Rule 4:6-2(e) "shall be filed and served in accordance with the time frames set forth in R[ule] 4:46-1."

summary judgment and disposed of as provided by R[ule] 4:46." R. 4:6-2; see also Lederman v. Prudential Life Ins. Co. of Am., 385 N.J. Super. 324, 337 (App. Div. 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 Hum. 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). Governed by these standards, we are satisfied the judge properly dismissed plaintiff's complaint.

To establish negligence, a plaintiff must prove: "(1) a duty of care, (2) a breach of that duty, (3) actual and proximate causation, and (4) damages." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (quoting Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 594 (2013)). Additionally, "under the doctrine of respondeat superior[,] an employer will be held vicariously liable 'for the negligence of an employee causing injuries to third parties, if, at the time of the occurrence, the employee was acting within the scope of his or her employment.'" Haviland v. Lourdes Med. Ctr. of Burlington

Cnty. Inc., 250 N.J. 368, 378 (2022) (quoting Carter v. Reynolds, 175 N.J. 402, 408-09 (2003)).[5]

"A plaintiff bears the burden of establishing th[e four] elements [of negligence] 'by some competent proof.'" Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Davis, 219 N.J. at 406). Generally, "negligence is not presumed." Rocco v. N.J. Transit Rail Operations, Inc., 330 N.J. Super. 320, 338-39 (App. Div. 2000) (citations omitted).

In discussing a plaintiff's burden in establishing the elements of negligence, our Supreme Court has instructed:

> [i]n most negligence cases, the plaintiff is not required to establish the applicable standard of care. Sanzari v. Rosenfeld, 34 N.J. 128, 134 (1961). In those cases,"[i]t is sufficient for [the] plaintiff to show what the defendant did and what the circumstances were. The applicable standard of conduct is then supplied by the jury[,] which is competent to determine what precautions a reasonably prudent [person] in the position of the defendant would have taken." Ibid. Such cases involve facts about which "a layperson's common knowledge is sufficient to permit a jury to find that the duty of care has been breached without the aid of an expert's opinion." Giantonnio v. Taccard, 291 N.J. Super. 31, 43 (App. Div. 1996).

[5] As the Court noted in Haviland, even in situations where an AOM is not required under the statute, as is the case here, a plaintiff may be required to present expert testimony to educate jurors about the standards of care of the relevant occupation. 250 N.J. at 384.

> In some cases, however, the "jury is not competent to supply the standard by which to measure the defendant's conduct," Sanzari, 34 N.J. at 134-35, and the plaintiff must instead "establish the requisite standard of care and [the defendant's] deviation from that standard" by "present[ing] reliable expert testimony on the subject." Giantonnio, 291 N.J. Super. at 42. . . . [W]hen deciding whether expert testimony is necessary, a court properly considers "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." Butler v. Acme Mkts. Inc., 89 N.J. 270, 283 (1982). In such cases, the jury "would have to speculate without the aid of expert testimony." Torres v. Schripps, Inc., 342 N.J. Super. 419, 430 (App. Div. 2001).
>
> [Davis, 219 N.J. at 406-07 (alterations in original).]

"Because of the innate complexities of [professional] malpractice actions," issues concerning a defendant's standard of care and breach of that standard "do not usually fall within the common knowledge of an average juror." Cowley v. Virtua Health Sys., 242 N.J. 1, 19 (2020). "At its core, the common knowledge exception allows jurors to 'supply the applicable standard of care . . . to obviate the necessity for expert testimony relative thereto.'" Ibid. (quoting Sanzari, 34 N.J. at 141). But "a jury of lay[persons] cannot be allowed to speculate as to whether the procedure followed by a [defendant in a professional malpractice action] conformed to the required professional standards." Ibid.

(citation omitted) (second alteration in original).

Accordingly, it is appropriate to invoke the common knowledge exception in professional malpractice cases where the "carelessness of the defendant is readily apparent to anyone of average intelligence and ordinary experience." Chin v. St. Barnabas Med. Ctr., 160 N.J. 454, 469-70 (1999) (citations omitted). "The trial of such a case is essentially no different from 'an ordinary negligence case.'" Id. at 469 (quoting Rosenberg v. Cahill, 99 N.J. 318, 325 (1985)). Examples of cases applying the common knowledge doctrine exception include extracting the wrong tooth, Hubbard v. Reed, 168 N.J. 387, 396 (2001), pumping gas instead of fluid into a patient's uterus, Chin, 160 N.J. at 471, filling a prescription with medication other than the drug prescribed, Bender v. Walgreen E. Co., 399 N.J. Super. 584, 590-91 (App. Div. 2008), and using a caustic solution rather than soothing medication post-surgery, Becker v. Eisenstodt, 60 N.J. Super. 240, 242-46 (App. Div. 1960). In short, cases applying the common knowledge exception "involve obvious or extreme error." Cowley v. Virtua Health Sys., 456 N.J. Super. 278, 290 (App. Div. 2018) (citing Bender, 399 N.J. Super. at 590).

Governed by these principles, we are persuaded the judge properly concluded an ordinary juror could not determine whether Ha was negligent in

administering the cupping treatment unless the jury had the benefit of an expert's opinion regarding: the proper temperature of the cups; how long the cups should be left on a patient; how many people typically are involved in the procedure; and similar protocols. Further, because it is not within the common knowledge of a lay juror to determine whether Ha deviated from an accepted standard of care during plaintiff's cupping treatment, the judge properly dismissed the complaint.

Given our conclusions, we need not address at length plaintiff's contention that the judge erred in denying her reconsideration motion. A trial court's decision to deny a motion for reconsideration is reviewed for an abuse of discretion. Granata v. Broderick, 446 N.J. Super. 449, 468 (App. Div. 2016) (citing Fusco v. Bd. of Educ., 349 N.J. Super. 455, 462 (App. Div. 2002)). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (citation omitted).

Reconsideration should only be used "for those cases which fall into that narrow corridor in which either[:] 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt

either did not consider, or failed to appreciate the significance of probative, competent evidence." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (citation omitted). Here, plaintiff fails to show how the judge's decision was based on a palpably incorrect or irrational basis, or that he failed to appreciate the evidence presented by the parties relative to defendants' motions to dismiss. Additionally, to the extent she contends the judge erred in denying her request for oral argument on her reconsideration motion, we are not persuaded. As discussed, the judge heard argument on the initial dismissal motions. Therefore, while oral argument on substantive motions should ordinarily be granted, Filippone v. Lee, 304 N.J. Super. 301, 306 (App. Div. 1997), when a movant seeks reconsideration, but presents no new issues, the denial of oral argument is not an abuse of discretion. Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010).

Affirmed.