SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2252-21

IN THE MATTER OF THE ESTATE OF ROSALIE JEAN RYAN, Deceased.

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Argued September 12, 2023 – Decided October 16, 2023

Before Judges Whipple, Enright and Paganelli.

On appeal from the Superior Court of New Jersey, Chancery Division, Gloucester County, Docket No. 16-00705.

Daniel L. Mellor argued the cause for appellant/cross-respondent Veronica A. Kirschling (Kulzer & DiPadova, PA, attorneys; Daniel L. Mellor, on the briefs).

John H. Shindle argued the cause for respondents/cross-appellants Patrick Kirschling, Thomas Kirschling, William Kirschling, John Kirschling and Michael Kirschling (Ward, Shindle & Hall, attorneys; John H. Shindle and Peter J. Bonfiglio IV, of counsel and on the briefs).

PER CURIAM

This matter returns to us for our consideration of the motion judge's "[a]ttorney's fee and allowance" order dated February 9, 2022.[1] The post-trial order provided for the shifting of the payment of the parties' attorneys' fees, in the same amount, to the other. The parties contend that the motion judge erred by shifting to them the obligation to pay their adversary's attorney fees, in violation of the "American Rule." Defendant appeals, arguing that the motion judge erred by shifting the payment of plaintiffs' attorney's fees to her under exceptions to the American Rule created by the New Jersey Supreme Court. Plaintiffs' cross-appeal asserts that the motion judge erred by ordering an allowance for their payment of defendant's attorney's fees under R. 4:58, Offer Of Judgment, a court rule exception to the American Rule. We determine that the motion judge erred in both respects and, therefore, vacate the order and remand the matter for entry of an order consistent with this opinion.

I.

[1] Previously we considered plaintiffs' appeal, from a different trial judge's January 30, 2020 judgment award, in their favor. Therefore, we are familiar with the facts and circumstances in this matter. In the Matter of the Estate of Rosalie Jean Ryan, No. A-2806-19, slip op. at 2 (App. Div. December 1, 2021). We note that the decedent is identified in the record as both Rosalie Jean Ryan and Rosalie Jeanne Ryan.

To determine the issues before us, we must construe our Court's precedent and the application of a court rule. These are legal determinations, not entitled to any special deference, and our review is de novo. In re Ordinance 2354-12 of Tp. of West Orange, Essex County v. Township of West Orange, 223 N.J. 589, 596 (2015) (citing Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.")). However, we apply a deferential standard in reviewing factual findings by a judge. Balducci v. Cige, 240 N.J. 574, 595 (2020).

Our Court has noted that:

> In the field of civil litigation, New Jersey courts historically follow the "American Rule," which provides that litigants must bear the cost of their own attorneys' fees. Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 404 (2009). This Court has noted that "[t]he purposes behind the American Rule are threefold: (1) unrestricted access to the courts for all persons; (2) ensuring equity by not penalizing persons for exercising their right to litigate a dispute, even if they should lose; and (3) administrative convenience." In re Niles Trust, 176 N.J. 282 (2003).
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> [Innes v. Marzano-Lesnevich, 224 N.J. 584, 592 (2016).]

II.

In concluding that plaintiffs could shift the cost of their attorneys' fees to defendant, the motion judge determined that:

> There are built-in exceptions to New Jersey's application of the American Rule which are incorporated into R. 4:42-9. The American Rule does not preclude an allowance of reasonable counsel fees where the incurring there of is a traditional element of the particular cause of action. See In re Niles Trust, 176 N.J. 282, 294 (2002). Breach of fiduciary duty is one of those causes of action. Breach of fiduciary duty is a tort theory, such that attorneys' fees incurred as a result of that breach may be recoverable as a portion of the plaintiff's damages. In re Estate of Lash, 169 N.J. 20, 27 (2001).

Certainly, there are exceptions to the American Rule. Two exceptions may have played a role in the motion judge's decision: (1) the "fiduciary malfeasance" exception, Gannett Satellite Info. Network, LLC v. Twp. of Neptune, 254 N.J. 242, 258 (2023) (quoting Litton Indus., Inc. v. IMO Indus. Inc., 200 N.J. 372, 405 (Rivera-Soto, J., concurring)) and (2) the "third-party litigation" exception. DiMisa v. Acquaviva, 198 N.J. 547, 553-54 (2009). We have analyzed the motion judge's decision through these exceptions and conclude that neither provides the necessary support.

A.

The fiduciary malfeasance exception "presents a tightly circumscribed common law exception to the American Rule that defies ready description."

Litton, 200 N.J. at 405 (Rivera-Soto, J., concurring). The exception consists of a "narrow category of decisions [that] arise[] in settings involving breaches of fiduciary duties." Gannett, 254 N.J. at 259. In these cases, our Court has held: (1) "a negligent attorney is responsible for the reasonable legal expenses and attorney fees incurred by a former client in prosecuting [a] legal malpractice action," Saffer v. Willoughby, 143 N.J. 256, 272 (1996); (2) "a successful claimant in an attorney-misconduct [not attorney negligence] case may recover reasonable counsel fees incurred in prosecuting that action," Packard-Bamberger & Co., Inc. v. Collier, 167 N.J. 427, 443 (2001); (3) "a prevailing beneficiary [regardless of the existence of an attorney-client relationship] may be awarded counsel fees incurred to recover damages arising from an attorney's intentional violation of a fiduciary duty," Innes, 224 N.J. at 598; and (4) counsel fees may be awarded against a non-attorney fiduciary where "an executor or trustee commits the pernicious tort of undue influence . . . ." In re Niles Trust, 176 N.J. 282, 298-99 (2003).

Despite allowing for these exceptions, our Court is reluctant to open the "floodgates," id. at 299, and "[d]epartures from the 'American Rule' are the exception." Innes, 224 N.J. at 597. Therefore, the fiduciary malfeasance exception has been limited to those circumstances involving attorney

fiduciaries, Saffer, Packard-Bamberger, and Innes, and where the claimant can establish the "pernicious tort of undue influence." Niles Trust, 176 N.J. at 298-99. Neither of these circumstances are present at the bar. Defendant is not an attorney, and, therefore, Saffer, Packard-Bamberger, and Innes, are inapplicable.

Our Court confirmed the attorney actor requirement in In re Estate of Vayda, 184 N.J. 115 (2005). In Vayda, the non-attorney executor "did little to administer the estate or carry out his duties as executor . . . ." Id. at 118. "[A]ll of [the executor's] activities, taken as a whole, amount[ed] to breach of fiduciary duties to the beneficiaries of the estate . . . ." Id. at 119. Our Court "granted . . . certification limited solely to one discrete question: whether the trial court properly concluded that an executor who breached his duty to beneficiaries of the estate should be obligated for the payment of counsel fees incurred by the prevailing party." Id. at 120.

Our Court explained that it:

> [S]pecifically limited the reach of In Re Estate of Lash to attorney breach of fiduciary duty malfeasance only, explaining that "the fact that a person owes another a fiduciary duty, in and of itself, does not justify an award of fees unless the wrongful conduct arose out of an attorney-client relationship."
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> [Id. at 122 (quoting Lash, 169 N.J. at 34).]

Moreover, our Court found that:

> This case invites us to create yet another exception to the American Rule, one that would allow attorney fee shifting whenever a non-attorney executor is removed because of, among other things, breach of a fiduciary duty and bad faith against co-beneficiaries. This is an invitation we ultimately decline to accept.
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> . . . .
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> [U]nder the circumstances presented here – in which the allegations against the non-attorney executor involve negligence in the administration of the estate and [ ] claimed bad faith . . . – we decline to extend recovery for attorneys' fees.
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> [Id. at 123-24 (emphases added).]

Therefore, since defendant is not an attorney, the motion judge's decision finds no support in Saffer, Packard-Bamberger, and Innes, and is completely contradicted by our Court's decision in Vayda.

B.

Counsel fees may be awarded against a non-attorney fiduciary when they "commit[ ] the pernicious tort of undue influence . . . ." Niles Trust, 176 N.J. at 298-99. However, in the matter at bar, there was no finding of undue influence.

"Undue influence . . . [is] defined as "'mental, moral or physical' exertion which has destroyed the 'free agency of a testator' . . . by preventing the testator . . . 'from following the dictates of [their] own mind and will and accepting instead the domination and influence of another."'" Niles Trust, 176 N.J. at 299

(quoting Haynes v. First Nat'l State Bank of New Jersey, 87 N.J. 163, 176 (1981) quoting In re Estate of Neuman, 133 N.J. Eq. 532, 534 (E & A. 1943)). "Moreover, [undue influence is] a form of fraud . . . ." Id. at 300.

After noting that plaintiffs pled undue influence, the trial judge found that decedent was "taken care of by" defendant; that defendant gave decedent "good care"; that they "really didn't get any criticism of how [defendant] took care of [decedent]"; and defendant was "trying to take care of [decedent] and to basically form a life together."

Moreover, when we last reviewed this matter, we observed that the trial judge "specified that the funds were not necessarily wrongfully taken, rather they were merely unexplained as [defendant] was unable to recall the reason for the withdrawals," In the Matter of the Estate of Rosalie Jean Ryan, slip op. at 5; "[t]he judge found no fraud," id. at 15; an "innocent commingling of funds was to be expected," ibid.; defendant "did not actively or maliciously engage in conduct," ibid.; and "[b]y designating certain transactions as 'unexplained,' the judge did not characterize them as wrongful taking of decedent's assets," id. at 16.

Our review of the trial judge's factual findings fails to reveal that plaintiffs established undue influence, or any of the intentional and fraudulent misconduct

that was concerning to our Court when it created the undue influence exception to the American Rule. Niles Trust, 176 N.J. at 300.

Therefore, the motion judge's decision finds no support in Niles Trust.

C.

The third-party exception to the American Rule provides "that if the commission of a tort proximately causes litigation with parties other than the tortfeasor, the plaintiff is entitled to recover damages measured by the expense of that litigation with third parties." Jugan v. Friedman, 275 N.J. Super. 556, 573 (App. Div. 1994) (citing Feldmesser v. Lemberger, 101 N.J.L. 184, 186-88 (E. & A. 1925) (permitting recovery of litigation costs against a tortfeasor, including attorneys' fees, by a party who is forced into litigation with a third party as the result of the tortfeasor's fraud)). In DiMisa, our Court explained that:

> [A] prerequisite to an award of counsel fees under th[is] exception to the American Rule is litigation with a third party precipitated by another party's wrongful act. No matter how egregious that wrongful act, in the direct action between a plaintiff and a defendant, each party bears his or her own fees under the American Rule. It is only the requirement of litigation against a stranger that calls the exception into play.
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> [DiMisa, 198 N.J. at 553-54.]

Therefore, under the third-party exception to the American Rule, counsel fees were recoverable against a defendant when the litigation required the naming of: (1) third parties, "the minors, the household staff, [and the guardian ad litem] . . .," Niles Trust, 176 N.J. at 293; (2) a third-party surety, Lash, 169 N.J. at 28; and (3) "third parties, including the other defendants," Jugan, 275 N.J. Super. at 573.

In the matter at bar, the motion judge determined that "[b]reach of fiduciary duty is a tort theory, such that attorneys' fees incurred as a result of that breach may be recoverable as a portion of the plaintiffs' damages."

We agree that the breach of fiduciary duty is a tort, Lash, 169 N.J. at 27, however, absent from the motion judge's analysis is any indication of third-party litigation. Indeed, there are no other defendants. Instead, there are only direct claims against the defendant. On this basis, the motion judge's determination "is tantamount to charging the losing part[y] with the prevailing parties' counsel fees." Niles Trust, 176 N.J. at 296. That determination is a direct violation of the American Rule.

Further, Vayda declines to find an American Rule exception, applicable directly against a non-attorney fiduciary, premised merely on a breach of the fiduciary's duty. Vayda, 184 N.J. at 124.

Therefore, the motion judge's decision finds no support in the third-party exception to the American Rule or in the face of Vayda.

We find no fiduciary malfeasance or third-party litigation exception to the American Rule that would allow for the shifting of plaintiffs' attorneys' fees to defendant and we vacate that part of the motion judge's "[a]ttorney[s'] fee[s] and allowance" order dated February 9, 2022.[2]

III.

The motion judge determined that defendant was entitled to a fee allowance under Rule 4:58. Our court rules may provide for an exception to the American Rule. Gannett, 254 N.J. at 259.

R. 4:58-3, in relevant part, provides:

> (a) If the offer of a party other than the claimant is not accepted, and the claimant obtains a judgment . . . that is favorable to the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by Rule 4:58-2.
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> (b) A favorable determination qualifying for allowances under the rule is a judgment . . . in an

[2] Since we conclude that plaintiffs are not entitled to shift the cost of their attorneys' fees to defendant, any issues as to the motion judge's apparent determination that those fees were reasonable are rendered moot and do not require our attention. See RPC 1.5 ("A lawyer's fee shall be reasonable.") and Rendine v. Pantzer, 141 N.J. 292, 334-35 (1995) ("[T]he first step in the fee-setting process is to determine the 'lodestar': the number of hours reasonably expended multiplied by a reasonable hourly rate.")

> amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less.
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> (c) No allowances shall be granted if . . . (5) an allowance would impose undue hardship or otherwise result in unfairness to the offeree. If, however, undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly. The burden is on the offeree to establish the offeree's claim of undue hardship or lack of fairness.

The allowances provided under Rule 4:58-2(a) include "a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance."

"The offer of judgment rule [ ] was 'designed . . . as a mechanism to encourage, promote, and stimulate early out-of-court settlement of . . . claims that in justice and reason ought to be settled without trial.'" Willner v. Vertical Reality, Inc., 235 N.J. 65, 81 (2018) (citing Schettino v. Roizman Dev., Inc., 158 N.J. 476, 482 (1999) quoting Crudup v. Marrero, 57 N.J. 353, 361 (1971)). "To incentivize such pre-trial settlement, 'the rule imposes financial consequences on a party who rejects a settlement offer that turns out to be more favorable than the ultimate judgment' by a certain amount." Ibid.

In the matter at bar, the motion judge noted that "early in the litigation, the [d]efendant[] made an offer of judgment to the [plaintiffs] in the amount of

$15,571.14." Therefore, for defendant to collect allowances under the offer of settlement rule, the motion judge correctly determined that "the award would need to be below $12,457." However, the trial judge "enter[ed] judgment in the amount of $15,000." Since the judgment amount exceeded the 80% threshold, the rule would not permit defendant to collect an allowance of counsel fees. We find that analysis is correct, and it should have ended here.

Instead, the motion judge determined:

> However, in case[s where a] judgment is "molded" the Court must take the molded amount and use that for the calculation. See, Malick v. Seaview Lincoln Mercury, 398 N.J. Super. 182 (App. Div. 2008). In doing so, the Court observes the prior judgment which states that the judgment was subject to a Medicaid lien much larger than the $15,000 award. Ostensibly, the award was molded to $0.00 and a declaratory judgment. Obviously, anything is better than nothing therefore the defendant's offer of judgment meets the requirements of the Rule.

We recognize, in certain situations not presented here, judges have the authority to mold judgments or verdicts.[3] Nevertheless, we do not understand the trial

[3] "[T]he molding of a monetary jury award is appropriate when done to conform with and reflect allocation of liability," Wadeer v. New Jersey Mfrs. Ins. Co., 220 N.J. 591, 611 (2015); "[a] verdict may be molded in consonance with the plainly manifested intention of the jury . . .," Turon v. J & L Constr. Co., 8 N.J. 543, 552 (1952); "[i]t is within the competence of the trial judge to mold the verdict to carry out the finding of the jury, in accordance with his instructions

judge's opinion to provide for molding the judgment to zero, based on the Medicaid lien.[4] Indeed, the trial judge never said that it did. Instead, in her oral opinion, the trial judge found "that [defendant] . . . failed to account for the . . . withdrawal of $15,000." She also found "that that means it would be [estate] property. And that means that it would be subject to the . . . Medicaid lien . . ." Later, the trial judge added, "[s]o I do find in favor of the plaintiffs and enter

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to the jury, and as assented to by all parties," Ipp v. Brawer Bros. Silk Co., 130 N.J.L. 491, 493 (1943); "[a] verdict in a civil cause which is defective or erroneous in a mere matter of form, not affecting the merits or rights of the parties, may be amended by the court to conform to the issues and give effect to what the jury unmistakably found," Rossman v. Newbon, 112 N.J.L. 261, 264 (1934); [i]t is appropriate to mold the jury verdict to reflect the parties' high-low agreement, Malick v. Seaview Lincoln Mercury, 398 N.J. Super. 182 (App. Div. 2008); [m]olding is appropriate in uninsured and underinsured cases, Taddei v. State Farm Indem. Co., 401 N.J. Super. 449 (App. Div. 2008); "[V]erdict was molded by the court . . . in order to take account of disability benefits received . . . for which lost wages were awarded by the jury," Reid v. Finch, 425 N.J. Super. 196, 199 (Law Div. 2011); and N.J.S.A. 2A:15-97 "[i]n any civil action brought for personal injury or death . . . if a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, . . . shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff . . . ."

[4] The motion judge may have acknowledged the lack of molding when he observed "there was a Medicaid lien which the estate was liable for. Even so, the award was set at $15,000 in damages regardless of the lien . . . ." Nonetheless the motion judge's analysis was founded on his understanding that the trial judge molded the verdict.

judgment in the amount of $15,000 in favor of . . . [the] estate. And I would assume that anything in the estate was subject to a Medicaid lien. I don't know . . . ." Further, in the "Order of Judgment" the trial judge provided that "[j]udgment is entered against [defendant] in the amount of $15,000, payable to the Estate of Rosalie Jeanne Ryan, subject to the Medicaid lien." Indeed, even when we previously considered this case, we simply noted that "[t]he judge directed the $15,000 be paid by [defendant] to decedent's estate, thereby, as stated in the judgment, 'subject[ing] it to the Medicaid lien.'" In the Matter of the Estate of Rosalie Jean Ryan, slip op. at 2 n.2.

An acknowledgement that Medicaid has a lien against estate proceeds is not molding the $15,000 judgment against defendant, for her failure to account, to zero. Instead, the judgment stands, and was presumably paid, in full, by defendant in the amount of $15,000 to the estate. We also recognize that the estate beneficiaries may not receive any of the proceeds of the judgment because of the Medicaid lien.

Nonetheless, the distinction is meaningful because, once viewed correctly, the motion judge's remaining analysis, under Rule 4:58-3(b), is rendered a nullity. The $15,000 judgment is not "80% or less of the [$15,571.14] offer . . . ." R. 4:58-3(b). Therefore, defendant did not "obtain a favorable

determination," R. 4:58-3(b), and would not be entitled to allowances, R. 4:58-3(a). We conclude that the motion judge erred in his application of R. 4:58-3.

We find no court rule exception to the American Rule that would allow for the shifting of defendant's attorneys' fees to plaintiffs and we vacate that part of the motion judge's "[a]ttorney[s'] fee[s] and allowance" order dated February 9, 2022.[5]

We conclude that the motion judge erred in shifting the parties' attorneys' fees to the other in violation of the American Rule. Each party should bear the cost of their own attorneys' fees. Therefore, we vacate the motion judge's "[a]ttorney's fee and allowance" order dated February 9, 2022, and remand the matter for entry of an order consistent with this opinion. We do not retain jurisdiction.

Vacated and Remanded.

[5] Consistent with our determination that we need not address the reasonableness of plaintiffs' attorneys' fees, considering our decision, we likewise conclude that because defendant is not entitled to an allowance of her attorneys' fees, any issues as to whether those fees were reasonable are rendered moot and do not require our attention. See RPC 1.5 ("A lawyer's fee shall be reasonable") and Rendine, 141 N.J. at 334-35 ("[T]he first step in the fee-setting process is to determine the 'lodestar': the number of hours reasonably expended multiplied by a reasonable hourly rate."). Moreover, the motion judge's determination that defendant established "undue hardship" is similarly rendered moot. R. 4:58-3(c).