SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2632-20

C.S. and G.K., o/b/o minor plaintiff, S.K.,

Plaintiffs-Appellants,

v.

BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, NANCY IATESTA, MEGAN CORLISS, ANN ROCK, and ALAN IACHINI,

Defendants-Respondents.

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Argued January 24, 2023 – Decided February 8, 2023

Before Judges Sumners, Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0321-19.

Philip E. Stern argued the cause for appellants (DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, PC, attorneys; Philip E. Stern, of counsel and on the briefs).

Todd S. McGarvey argued the cause for respondents (Anderson & Shah, LLC, attorneys; Todd S. McGarvey, of counsel and on the brief; Erin Donegan, on the brief).

PER CURIAM

In this action alleging disability discrimination, hostile educational environment, and bullying of a student, plaintiffs C.S. and G.K. o/b/o minor plaintiff, S.K.,[1] appeal from orders granting defendants Bridgewater-Raritan Regional Board of Education (Board), Nancy Iatesta, Megan Corliss, Ann Rock, and Alan Iachini summary judgment and denying reconsideration. We affirm.

We take the following facts from the summary judgment record, viewing them in the light most favorable to the non-moving plaintiffs. See Richter v. Oakland Bd. of Educ., 246 N.J. 507, 515 (2021).

S.K. was a female student who suffered from generalized anxiety disorder and depression. S.K.'s family moved to Bridgewater in 2017. In the summer of 2017, S.K. had a meeting with a school guidance counselor, Lori Macsata. This was S.K.'s first contact with the District. S.K. was accompanied by her father, G.K. They explained S.K. was a student with disabilities including generalized anxiety disorder and depression. S.K. told Macsata that excessive classroom heat and the possibility of fainting were two of S.K.'s triggers for anxiety and

[1] We refer to plaintiffs by initials to protect S.K.'s privacy. See R. 1:38-3(a)(2).

depression. Macsata responded that she had "never heard of anything so ridiculous before, having anxiety and a fear of heat/fainting." Macsata then stated, "there is no air conditioning and you're most likely going to get lost your first couple of days."

S.K. enrolled in seventh grade at Bridgewater-Raritan Middle School at the start of the 2017-2018 school year. S.K. returned home from the first day of class in a "heightened state of anxiety." Later that day, S.K. attempted suicide by tying a scarf around her neck that was attached to a hook in her room.[2] She was admitted to the Carrier Clinic on September 8, 2017, for one week of psychiatric treatment. The Middle School was advised of these circumstances.

Ann Rock replaced Macsata as S.K.'s guidance counselor. Rock held a "reentry meeting" with S.K.'s parents, the school nurse, and student assistance counselor Ruthann Lowell, where they devised a plan for S.K.'s "partial return to school." The plan was to "take it slow, baby steps." The parties dispute the exact terms of the reentry plan. S.K.'s mother, C.S., attended the reentry meeting and testified that S.K. was "given a universal pass so that if she felt like her anxiety was increasing, she could excuse herself so that she could collect

[2] Defendants' clinical psychology expert referred to this behavior and holding "a butterknife to her wrist" as "suicidal gestures."

herself." C.S. acknowledged the meeting was "productive" and described helpful "strategies" that were being made to S.K. such as always allowing S.K. to have her water bottle with her, being given a universal pass, and that she knew that the school nurse and Lowell were available to her as resources.

On September 16, 2017, S.K. returned to school on a modified schedule, as specified in the Carrier Clinic's discharge plan. The plan shortened her school day. Under the plan, S.K. arrived "later in the morning" than other students and went home after attending only three periods.

Plaintiffs contend that Rock's deposition testimony shows she did not view S.K. as a student with a disability. Additionally, plaintiffs claim that from September through December 2017, S.K., G.K., and C.S. attempted to reason with Rock to stop discriminating against S.K. but were unsuccessful.

During an overnight school-sponsored camping trip in mid-October 2017, S.K. complained of stomach pains which she attributed to her anxiety and sought out the nurse. Rock told S.K. that she "knew the moment she saw [S.K.] walk up to the nurse that [S.K.] wanted to go home and that, [her] stomach wasn't hurting, [she] just want[ed] to go home." S.K. testified that her "stomach was hurting" and she was "homesick" but that her goal was not to go home. S.K. testified that later, Rock helped her calm her anxiety by showing her some old

pictures and talking with her. S.K. explained Rock "was helpful" and did help her "calm down."

At her deposition, S.K. testified that as she was eating lunch in the nurse's office on Halloween, Rock told her that her "life was miserable because [she] had no friends" and she "needed to start making them, and [she] couldn't eat lunch there anymore every day. It had to be limited to once or twice a week." In addition, S.K. testified that Rock told her to "get used to it here, [she was] not going back" to prior school in Morristown.

S.K. testified that when she came into school late, Rock would ask her "why didn't you come in on time." Ms. Rock did this "three, four times." Ibid. When S.K. arrived twenty minutes late for a delayed opening, Rock told S.K. that she was "really disappointed" and that it was "really upsetting that [S.K.] came in [late] on a delayed opening." On another occasion, Rock ran out to speak with S.K.'s mother in her car and S.K. testified that she was "scared" and it "wasn't ideal." S.K. testified that Rock told her to "go sign in, go to your class." S.K. testified that Rock once asked whether S.K.'s older sister got to school on time and Rock also stated that she knew her older sister "has problems." S.K. testified that this made her "uncomfortable."

Finally, S.K. testified that Rock told her "anxiety wasn't real," that she "made it up," and that it was "a learned behavior to get out of school." S.K. could not recall exactly when this was said but was confident it was "within the first few months" and "only happened once."

On January 12, 2018, G.K. emailed Principal Iatesta, asking to meet her or the head of guidance to discuss S.K. Rock then called G.K. but he refused to speak to her. Iatesta set up a meeting on January 16, 2018, the first day after the MLK holiday weekend. Iatesta confirmed the meeting in the following email to G.K., which was copied to Rock and Superintendent Lazovick:

> It is always protocol to have a counselor or teacher (depending on the situation) call the parent first as they have direct knowledge of their students. When Ms. Rock called you (at my direction), you refused to speak with her and demanded that I call you right away or you would show up in my office Tuesday morning. Ms. Rock stated that she did not know when I would be able to call and that you shouldn't just show up without a scheduled time to meet.
>
> When I called you this afternoon, you demanded that I call the Superintendent and set up a meeting with the three of us. I stated that you were welcome to call the Superintendent to schedule a meeting and I would be happy to attend. You insisted a number of time[s] that I was to do that without allowing me an opportunity to speak. You then asked me if I would be willing to schedule a meeting with you on Tuesday, which we then did.

> If you or your daughter do not wish to speak with Ms. Rock that is your prerogative. Ms. Rock will however remain her counselor of record as counselors are assigned to a full team of students. If you would like her team changed for 8th grade, we will do that in the summer and she will then have a different counselor. [S.K.] does see our Student Assistance Counselor, Mrs. Lowell, and she can ask to speak with her anytime.
>
> We are aware of [S.K.'s] psychiatric issues and concerns from the Fall and are also aware that she does not want to attend school. Her psychiatrist has been in communication with the school and agrees that [S.K.] should be attending school for a full day. Her attendance has shown improvement and it is wonderful to see she has all As and Bs to date this marking period.
>
> I hope this clarifies things for you and I will see you on Tuesday January 16 at 8:30.

The meeting took place as scheduled. G.K. met with defendant Iatesta and Vice Principal Corliss to report Rock's behavior. G.K. made an audio recording of the meeting without the consent of Iatesta or Corliss. G.K. reported the list of statements made by Rock to S.K. that he compiled with C.S. and S.K. over the MLK weekend. Iatesta informed G.K. that she would "speak with [Rock] about the allegations." Plaintiffs claim that Iatesta had "a long, familial friendship with . . . Rock that pre-dated their working relationship" and that Iatesta was the person who hired Rock. Despite their friendship, Iatesta removed

Rock as S.K.'s guidance counselor on January 16, 2018, the same day as the meeting with G.K.

At the January 16 meeting, G.K. also requested the District investigate Rock's discriminatory behavior towards S.K. pursuant to the New Jersey Anti-Bullying Bill of Rights Act (Anti-Bullying Act), N.J.S.A. 18A:37-13.2 to -37. The investigation commenced in March.

To refute plaintiffs' claims that Rock was unsupportive, defendants' offered Rock's description of telephone conversations she had with C.S. during S.K.'s hospitalization at the Carrier Clinic. During her deposition, Rock did not recall the specific statements she made to C.S., aside from contacting an art therapist for S.K., but assured she would have told C.S. that S.K. should not be worrying about school, only her health at this time.

Following S.K.'s discharge from the Carrier Clinic, C.S. wrote an email to Rock, thanking her for her support and guidance, while also describing her as a "great mental health professional." Rock responded that defendants were "there to support all with each and every step."

Importantly, plaintiffs' answers to interrogatories state that the incidents of harassment, bullying, and hostile treatment were limited to "between September 18, 2017 and January 16, 2018." S.K. admitted she could not recall

any specific incidents of harassment or bullying during the second half of the school year, or since Rock was removed as her guidance counselor. Iatesta directed Rock "not to check in on [S.K.] as much, because [she] had Miss Lowell."

On March 12, 2019, plaintiffs filed a three-count complaint on behalf of S.K. against defendants Bridgewater-Raritan Regional School District Board of Education, Iatesta, Corliss, Rock, and Iachini (collectively, "defendants"). The complaint alleged disability discrimination and hostile educational environment in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -50, and bullying in violation of the Anti-Bullying Act.

Defendants retained licensed clinical psychologist Nancy Just, Ph.D., ABPP, who performed an independent psychological examination of S.K. in November and December 2020. Dr. Just reviewed S.K.'s medical records, performed a clinical interview, obtained a history from S.K., conducted psychological testing, and authored a report dated December 3, 2020. Considering the extensive information derived therefrom, Dr. Just diagnosed S.K. with generalized anxiety disorder; obsessive-compulsive disorder, with mixed obsessional thoughts and acts; major depressive disorder, mild; panic disorder; and body dysmorphic disorder. Dr. Just provided a detailed, fact-

specific explanation for her opinion that "even accepting that Ms. Rock made the comments she is accused of making," there was no evidence that "any alleged comments or actions by Ms. Rock" "caused clinically significant emotional distress." On the contrary, Dr. Just noted "one could argue that Ms. Rock's alleged statements and actions, although subjectively unpleasant to S.K., were instrumental to getting S.K. back to school full-time." Plaintiffs did not produce an expert report by any mental health expert during discovery.

After the close of discovery, defendants filed a motion for summary judgment, arguing the complaint should be dismissed because defendants acted prudently in making reasonable accommodations to meet S.K.'s needs and promptly in removing defendant Rock as S.K.'s guidance counselor upon learning of Rock's alleged conduct toward S.K.

The judge issued an oral decision and order granting summary judgment dismissing plaintiffs' complaint with prejudice. In addition to recounting the facts, the judge noted the alleged harassment and bullying occurred between September 18, 2017, and January 16, 2018. As S.K.'s guidance counselor, Rock was aware from doctors' notes of S.K.'s diagnosis of depression and anxiety. Rock had training in providing equal opportunities and access to students with disabilities. G.K. first reported the harassment and bullying by contacting

Iatesta by email on January 12, 2018. When Rock called G.K. he refused to speak to her.

A meeting was scheduled by Iatesta for January 16, 2018. G.K. presented a list of alleged statements Rock made to S.K. Iatesta made the Superintendent aware of the allegations. Rock denied making the statements and claimed that her conversations with S.K. were taken out of context. The day after the meeting, Iatesta met with Rock and informed her that she was no longer to have any communications, meetings, or counseling sessions with S.K. Instead, Lowell would serve in that role.

Iachini, the District's bullying coordinator, began his harassment, intimidation, and bullying (HIB) investigation in late March. The HIB investigation did not reveal harassment, intimidation, or bullying. The results of the HIB investigation were provided to plaintiffs on April 11, 2018.

The judge first ruled there was no private right of action under the Anti-Bullying Act. He noted that plaintiffs had not pleaded a cause of action for negligence. As to plaintiffs' claims of disability discrimination and hostile educational environment under the LAD, the judge applied the three-prong test adopted in L.W. ex rel. L.G. v. Toms River Regional Schools Board of

Education, 189 N.J. 381, 402-03 (2007).[3] The judge assumed for purposes of the motion that plaintiffs met the first prong which requires "discriminatory conduct that would not have occurred but for the student's protected characteristic."

The judge found the second prong posed a more difficult question, whether "a reasonable student of the same age, maturity level and protected characteristic would consider [the discriminatory conduct] severe or pervasive enough to create an intimidating hostile or offensive school environment." The judge noted that "[t]he required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the

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[3] The L.W. Court adopted a modified version of the standard for actionable hostile work environment adopted in Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 603-04 (1993), holding that

> in the educational context, to state a claim under the LAD, an aggrieved student must allege [(1)] discriminatory conduct that would not have occurred "but for" the student's protected characteristic, [(2)] that a reasonable student of the same age, maturity level, and protected characteristic would consider sufficiently severe or pervasive enough to create an intimidating, hostile, or offensive school environment, and [(3)] that the school district failed to reasonably address such conduct.

[L.W., 189 N.J. at 402-03.]

conduct." Lehmann, 132 N.J. at 607 (quoting Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991)). The judge further noted Lehmann directed that

> [r]ather than considering each incident in isolation, courts must consider the cumulative effect of the various incidents, bearing in mind "that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes."
>
> [Ibid. (quoting Burns v. McGregor Elec. Indus., 955 F.2d 559, 564 (8th Cir. 1992).]

Considering the cumulative effect of the alleged discriminatory conduct, the judge found "a reasonable jury could find that there was severe or pervasive conduct."

Regarding the third prong, "that the school district failed to reasonably address such conduct," the judge found that "no reasonable jury could find that defendants failed to reasonably address the conduct at issue in this matter." The judge found that "the moment the alleged . . . discriminatory conduct . . . was brought to any defendants' attention . . . there was an immediate end to the conduct." S.K. was immediately given a new counsellor, Rock was instructed to have no further dealings with S.K., which Rock complied with. The judge was satisfied "no reasonable jury could find that the school district failed to reasonably address the conduct" or "failed to accommodate any disability of

S.K." On the contrary, "after S.K. returned to school after her hospitalization, defendants provided her with reasonable accommodations." Therefore, the judge found defendants were entitled to summary judgment.

Plaintiffs moved for reconsideration. The judge issued an oral decision and order denying the motion. The judge noted the difference between employee discrimination that causes a hostile school environment and student-on-student discrimination that causes a hostile school environment. The judge found there was "no evidence" in the motion record that Iatesta was aware of Rock's proclivity to discriminate against students. He also found there was no evidence of failure to train district employees. The judge noted plaintiffs had no expert and reiterated his finding that the evidence showed the "district did not fail to reasonably address the conduct." The judge rejected plaintiff's argument that the third prong the test adopted in L.W. should not be applied because Rock was an employee. Noting the absence of biding appellate precedent, the judge declined to do a carve out for employee defendants. He also noted that Rock ceased any alleged discriminatory conduct once she was directed to have no further dealings with S.K. This appeal followed.

Plaintiffs raise the following point for our consideration:

THE COURT BELOW ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

A. Defendant Rock, Defendant Iatesta and the Board of Education Stand In Loco Parentis to S.K.

B. Plaintiffs Have Asserted a Viable Claim for Disability Discrimination.

C. Plaintiffs Have Asserted a Viable Claim for Hostile School Environment.

We review a grant of summary judgment "de novo and apply the same standard as the trial court." Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021). Summary judgment will be granted when "the competent evidential materials submitted by the parties," viewed in the light most favorable to the non-moving party, show there are no "genuine issues of material fact," and that "the moving party is entitled to summary judgment as a matter of law." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 23-24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). We must give the non-moving party "the benefit of the most favorable evidence and most favorable inferences drawn from that evidence." Est. of Narleski v. Gomes, 244 N.J. 199, 205 (2020) (quoting Gormley v. Wood-El, 218 N.J. 72, 86 (2014)). We owe no deference to the trial court's legal analysis and "review its conclusions de novo." RSI Bank v. Providence Mut.

Fire Ins. Co., 234 N.J. 459, 472 (2018) (quoting Motorworld, Inc. v. Benkendorf, 228 N.J. 311, 329 (2017)).

We begin our analysis by recognizing that "[f]reedom from discrimination is one of the fundamental principles of our society." Lehmann, 132 N.J. at 600. "The purpose of the LAD is to eradicate discrimination, whether intentional or unintentional." Id. at 604-05. "Therefore, the perpetrator's intent is simply not an element of the cause of action." Id. at 605. In this context, "[p]laintiff need show only that the harassment would not have occurred but for her [disabilities]." Ibid.

In L.W., the Court concluded that "[t]he right of a student to achieve an education free from [peer] sexual harassment is certainly as important as the rights of an employee in a work setting." 189 N.J. at 402 (first alteration in original) (quoting K.P. v. Corsey, 228 F. Supp. 2d 547, 550 (D.N.J. 2002), rev'd on other grounds, 77 F. App'x 611 (3d Cir. 2003)). To that end, the Court has emphasized the primary role and obligations of a board of education:

> Although the overarching mission of a board of education is to educate, its first imperative must be to do no harm to the children in its care. A board of education must take reasonable measures to assure that the teachers and administrators who stand as surrogate parents during the day are educating, not endangering, and protecting, not exploiting, vulnerable children.

[Frugis v. Bracigliano, 177 N.J. 250, 268 (2003).]

Viewing the facts in a light most favorable to plaintiffs, together with all reasonable inferences therefrom, for summary judgment purposes, the record supports the judge's findings that plaintiffs satisfied the first and second prongs of the standard adopted in L.W. for liability under the LAD.

At issue in this appeal is whether the third prong of the standard should be applied where, as here, the alleged disability discriminatory and hostile educational environment stemmed from the conduct of a school board employee rather than a fellow student. The third prong required the District to "reasonably address" the alleged harassment, intimidation, discriminatory conduct, intimidation, and bullying. Id. at 403. Plaintiffs argues the trial court erred by applying the third prong. We disagree.

Absent the third prong, a school district would be liable for the discriminatory conduct of an employee towards a student, even if the school district took prompt remedial actions reasonably calculated to end the mistreatment and offensive conduct upon learning of it. We find no binding precedent[4] adopting plaintiffs' position and decline to do so. Instead, we hold

[4] Unpublished opinions do not constitute precedent and are not "binding upon any court." R. 1:36-3.

that to establish a prima facie case of disability discrimination and hostile educational environment under the LAD, based on the discriminatory, intimidating, or harassing conduct of a school employee, a plaintiff must satisfy the three-prong test set forth in L.W., 189 N.J. at 402-03.

Here, the undisputed fact that no further discrimination occurred after January 16, 2018, demonstrates the prompt remedial actions taken by the District upon learning of Rock's conduct towards S.K. were reasonably calculated to end the alleged harassment, intimidation, discriminatory conduct, and bullying and achieved that result.

Under these circumstances, the record fully supported the judge's finding that plaintiffs failed to satisfy the third prong. Accordingly, we find no basis for liability under the LAD. Summary judgment was properly granted to defendants dismissing the complaint.

We turn next to plaintiffs' claim that defendants were liable for compensatory and punitive damages and attorney's fees under the Anti-Bullying Act. The judge correctly found there was no private cause of action under the Act, which plaintiffs candidly acknowledged during oral argument before this court. See N.J.S.A. 18A:37-18 ("This act does not create or alter any tort liability."); N.J.S.A. 18A:37-37 (same); Dunkley v. Bd. of Educ., 216 F. Supp.

3d 485, 495 (D.N.J. 2016) (stating the Anti-Bullying Act "'does not create or alter any tort liability,' N.J.S.A. 18A:37-37, and therefore cannot support an independent cause of action"); Zelnick v. Morristown-Beard Sch., 445 N.J. Super. 250, 265 (Law Div. 2015) (noting the Anti-Bullying Act "by its own terms, does not create tort liability and therefore does not establish a standard of care"). Moreover, the District investigated the alleged bullying and discriminatory conduct and issued a report finding none.

Notably, plaintiffs did not plead that defendants are liable for negligence, did not move to amend their complaint to include a cause of action for negligence, and do not argue on appeal that defendants are liable for negligence. "If not pled in a complaint, a cause of action cannot spring to life for the first time in an appellate court opinion." Bauer v. Nesbitt, 198 N.J. 601, 610 (2009). Nor did plaintiffs allege the Board delegated authority to control the educational environment to a supervisor who abused the delegated authority. See Lehmann, 132 N.J. at 619-20 (explaining principles of vicarious liability of an employer for sexual harassment by a supervisor under the LAD). Here, neither Macsata nor Rock were supervisors.

Plaintiffs' argument that denial of their motion for reconsideration was error lacks sufficient merit to warrant extended discussion. R. 2:11-3(e)(1)(E).

Our review of the denial of a motion for reconsideration is limited. See Brunt v. Bd. of Trs., Police & Firemen's Ret. Sys., 455 N.J. Super. 357, 362 (App. Div. 2018). "[A] motion for reconsideration 'is not properly brought simply because a litigant is dissatisfied with a judge's decision, nor is it an appropriate vehicle to supplement an inadequate record.'" Guido v. Duane Morris LLP, 202 N.J. 79, 87 (2010). Rather, a motion for reconsideration "is primarily an opportunity to seek to convince the court that either 1) it has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the court either did not consider, or failed to appreciate the significance of probative, competent evidence." Id. at 87-88 (citation omitted). "We will not disturb the trial court's reconsideration decision 'unless it represents a clear abuse of discretion.'" Kornbleuth v. Westover, 241 N.J. 289, 301 (2020) (quoting Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994)).

Plaintiffs failed to show that the trial court's decision was "based upon a palpably incorrect or irrational basis" or that the trial court "either did not consider, or failed to appreciate the significance of probative, competent evidence." Ibid. (quoting Guido, 202 N.J. at 87-88). Nor have plaintiffs established that the trial court otherwise abused its discretion in denying his

motion for reconsideration. See id. at 301-02. Therefore, reconsideration was properly denied.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION