NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3151-21

JOHN J. DITZLER and PATRICIA PAYAN, husband and wife,

Plaintiffs-Respondents,

v.

SURGICAL CARE AFFILIATES, INC., d/b/a/ SOUTH JERSEY SURGICAL CENTER, SURGICAL CARE AFFILIATES, LLC, JOHN C. LEE, M.D., RANCOCAS ANESTHESIOLOGY ASSOCIATES, RANCOCAS ANESTHESIOLOGY, PA, and RA PAIN SERVICES, PA,

Defendants-Appellants.

____

Argued March 29, 2023 – Decided April 28, 2023

Before Judges Mayer and Bishop-Thompson.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-1103-19.

James E. Drake argued the cause for appellants (Drake Law Firm, PC, attorneys; James E. Drake, on the brief).

John S. Hoyt III argued the cause for respondents (Javerbaum Wurgaft Hicks Kahn Wickstrom & Sinins, attorneys; John S. Hoyt III, on the brief).

PER CURIAM

By leave granted, defendants Rancocas Anesthesiology, P.A.[1] and RA Pain Services, P.A. (Rancocas defendants) appeal from an April 12, 2022 order denying their motion for summary judgment based on the statute of limitations. We affirm.

We recite the facts from the summary judgment motion record. On April 5, 2017, plaintiff John Ditzler underwent right shoulder arthroscopy at defendant South Jersey Surgical Center (SJSC). Prior to the surgery, defendant John C. Lee, M.D., administered general anesthesia and an interscalene nerve block. Plaintiff suffered complications post-surgery related to the nerve block injection and went to the emergency department (ED) at a local hospital.

At the hospital, plaintiff reported shortness of breath, severe pain in his right shoulder and neck, and facial numbness. He told the ED doctor that "a nerve block hit [the] wrong nerve" during his surgery. According to the ED

---

[1] The complaint improperly designated Rancocas Anesthesiology, P.A. as Rancocas Anesthesiology Associates.

records, plaintiff reported that his surgeon told him, "the anesthesiologist put [plaintiff] to sleep too early and placed the nerve block in the wrong nerve and blocked the diaphragm nerve." The ED doctor diagnosed plaintiff with a "[r]ight hemidiaphragm paresis."

During the litigation, the following individuals were deposed: plaintiff's wife, Patricia Payan;[2] Dr. Lee; and Jeffrey Gordon, M.D., the president and managing partner of Rancocas Anesthesiology, P.A. and RA Pain Services, P.A. Payan asserted a per quod claim based on her husband's injuries. She passed away during the litigation but provided de bene esse trial testimony prior to her death.

At Dr. Lee's deposition, he was asked for the name of his medical group on the date of plaintiff's surgery. Dr. Lee responded: "Rancocas Anesthesiology Associates."[3] Dr. Lee testified he was a "vested partner in Rancocas Anesthesiology" and that the medical group had approximately twenty partners. Dr. Lee explained Dr. Gordon assigned anesthesiologists to different medical facilities and assigned Dr. Lee to SJSC on the date of plaintiff's surgery.

---

[2] We use the terms plaintiffs to refer to Payan and Ditzler and plaintiff to refer solely to Ditzler.

[3] Plaintiffs' counsel learned through discovery that Rancocas Anesthesiology Associates, as named, did not exist.

At his deposition, Dr. Gordon testified that Rancocas Anesthesiology, P.A. and RA Pain Services, P.A. were two distinct entities, and each billed patients separately. He explained Rancocas Anesthesiology, P.A. "provide[d] anesthesia services" and RA Pain Services, P.A. "provide[d] pain management of both acute and chronic pain," including interscalene nerve blocks. According to Dr. Gordon, because the member doctors felt the two medical groups performed "separate functions," RA Pain Services, P.A. and Rancocas Anesthesiology, P.A. were designated as separate companies. Dr. Gordon testified, "[w]hen [Dr. Lee] provided the interscalene block, it was for RA Pain Services, [P.A.,] and when he put [plaintiff] asleep for the surgery, it was for Rancocas [Anesthesiology, P.A.]." Dr. Gordon confirmed "[a]ll of the member doctors of th[e] two entities provide[d] services under both."

Billing and medical records produced during discovery identified different entities employing Dr. Lee. A medical note from the date of plaintiff's surgery, signed by Dr. Lee, listed "RA Pain Services, P.A." as Dr. Lee's employer. The bill for plaintiff's anesthesia directed payment be made to Rancocas Anesthesiology, P.A. In February 2019, plaintiffs' counsel received a letter from the office of Rancocas Anesthesiology Associates, even though that

entity did not exist, advising Dr. Lee was employed by Rancocas Anesthesiology, P.A. on the date of plaintiff's surgery.

On March 11, 2019, plaintiffs filed a complaint against Dr. Lee, SJSC, and fictitious defendants. The parties exchanged discovery over the next two years.

On July 6, 2021, the parties appeared for a case management conference. The judge handling the conference noted that a prior case management order compelled the Rancocas entities to produce "insurance policies and information about insurance coverage."

Plaintiffs' counsel told the judge that no insurance documents were produced, but Dr. Lee reported "one million dollars [in] coverage." Dr. Lee declined to provide plaintiffs' counsel any additional information or documents related to his malpractice insurance coverage.

Plaintiffs' counsel served a document request directed to the Rancocas entities, seeking excess and umbrella insurance policy information relevant to Dr. Lee. The Rancocas entities declined to respond because they were not named as defendants in the litigation at that time.

In the August 9, 2021 case management order, the judge permitted plaintiffs to serve a third-party subpoena on Rancocas Anesthesiology

Associates or join them as a party to obtain insurance coverage information. Plaintiffs served a subpoena duces tecum on Rancocas Anesthesiology Associates for insurance policies in effect on the date of plaintiff's surgery. Plaintiffs' counsel received no information in response to the subpoena.

On September 1, 2021, plaintiffs moved for leave to file an amended complaint, substituting the Rancocas defendants for fictitious parties. The judge granted the motion. On November 29, 2021, plaintiffs filed an amended complaint naming Rancocas Anesthesiology, P.A., RA Pain Services, P.A., and Rancocas Anesthesiology Associates as defendants. In the amended complaint, plaintiffs alleged that Dr. Lee was "an agent, servant, or employee" of the Rancocas defendants on the date of plaintiff's surgery.

The Rancocas defendants filed an answer. Dr. Lee filed an amended answer and asserted a crossclaim for indemnification against the Rancocas defendants.

On January 20, 2022, the Rancocas defendants moved for summary judgment based on the statute of limitations. The motion judge heard argument on March 21, 2022. In an April 12, 2022 order, the judge found the amended complaint related back to plaintiffs' original complaint and denied summary judgment.

In applying the relation back doctrine, the judge stated, "the key to relating back of an added claim[] is whether or not [it is] germane, that is whether [it] arise[s] out of the same occurrence or transaction or series of transaction[s] set forth in the pleading, which of course is very true here." He explained that "when a period of limitation[s] has expired, it is only a distinctly new or different claim or defense that is barred." The judge noted that the Rancocas defendants "argu[ed] strenuously that it is the same claim." The judge accepted that argument and found the "amendment constitute[d] the same matter more fully or differently laid or the gist of the action or the basi[c] subject of the controversy remain[ed] the same" and, therefore, plaintiffs' amended complaint "should be readily allowed under the doctrine of relation-back."

The judge also stated the Rancocas defendants did not dispute that Dr. Lee "[was] an employee or at least . . . a principal of the organization." Therefore, the judge concluded that Dr. Lee, Rancocas Anesthesiology, P.A., and RA Pain Services, P.A. were one party.

The judge found Dr. Lee's status as a shareholder and partner with the Rancocas defendants provided them with sufficient notice of plaintiffs' litigation. He explained, "Dr. Lee was on notice that this claim was being filed by . . . plaintiff[s], it was well-addressed in [Dr. Lee's] deposition, it was in the

actual complaint when [Dr. Lee] was served, and so therefore, . . . [the Rancocas defendants] received appropriate notice."

The judge then addressed the Rancocas defendants' argument that they suffered prejudice as a result of plaintiffs' assertion of claims against them more than two years after the accrual of plaintiffs' cause of action. In rejecting their argument, the judge found plaintiffs' claim against the Rancocas defendants was not based on medical negligence but rather the doctrine of respondeat superior as the employer or employers of Dr. Lee. As the judge explained, until Dr. Lee was adjudged liable for plaintiff's injuries, the claims based on indemnification and respondeat superior were not ripe. The judge determined that the Rancocas defendants, while not required to participate in discovery until such time as Dr. Lee may be found liable, "can if they want to participate in discovery as it applies to anything outside of the fact" that Dr. Lee is their employee.

On April 29, 2022, the Rancocas defendants filed a motion for leave to appeal from the denial of their summary judgment motion. In a June 14, 2022 order, we granted leave to appeal, specifying that the Rancocas defendants "file any supplemental merits brief by July 8, 2022," and plaintiffs file their merits brief by August 12, 2022. The parties advised they intended to rely on their motion briefs as their merits briefs.

On appeal, the Rancocas defendants raise several arguments in support of their contention that plaintiffs' amended complaint is barred by the statute of limitations. First, the Rancocas defendants claim that N.J.S.A. 2A:14-2 governs and plaintiffs should have filed a complaint against them within two years after the date of plaintiff's injury. The Rancocas defendants further assert the discovery rule, tolling accrual of plaintiffs' claims, is inapplicable because plaintiffs were aware of their claims against the corporate entities prior to the expiration of the statute of limitations. They also argue the fictitious party pleading rule did not apply because plaintiffs knew their identity as early as January 2019. In addition, the Rancocas defendants claim they suffered irreparable prejudice because they were unable to participate in discovery and defend against plaintiffs' claims for more than two years. We reject these arguments.

We review a trial court's grant of summary judgment de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'" Friedman v. Martinez, 242

N.J. 449, 471-72 (2020) (quoting R. 4:46-2(c)). In reviewing a summary judgment order, we consider the evidence in the light most favorable to the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Whether a statute of limitations applies in a given case "is ordinarily a legal matter and 'traditionally within the province of the court.'" Baez v. Paulo, 453 N.J. Super. 422, 436 (App. Div. 2018) (quoting Lopez v. Swyer, 62 N.J. 267, 274 (1973)). In reviewing a trial court's decision on a statute of limitations motion, we consider the motion record and legal issues de novo. Id. at 435-36 (citing Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 349-50 (2016)).

Plaintiffs contend the two-year statute of limitations under N.J.S.A. 2A:14-2 is inapplicable because their cause of action did not assert negligence against the Rancocas defendants. Rather, plaintiffs allege the Rancocas defendants are vicariously liable for Dr. Lee's malpractice under a theory of respondeat superior.

In the original complaint, plaintiffs mistakenly asserted that Dr. Lee "was the agent or employee of" SJSC. Based on information provided during discovery, but more than two years after plaintiff's injuries, plaintiffs first learned that Dr. Lee might be employed by one or more of the Rancocas defendants and not SJSC. As of the filing date of their merits brief, plaintiffs

remained uncertain which of the Rancocas defendants employed Dr. Lee on the date of plaintiff's surgery.

"Under respondeat superior, an employer can be found 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." Carter v. Reynolds, 175 N.J. 402, 408-09 (2003). An indemnity claim based upon respondeat superior, as asserted by Dr. Lee and plaintiffs, is a claim for payment related to an employment relationship, not an action for personal injury. See Galvoa v. G.R. Robert Constr. Co., 179 N.J. 462, 467 (2004) ("The . . . 'essence' of . . . respondeat superior relies on the concept of employer '"control"' over an employee."). "[T]he cause of action for . . . indemnity does not technically accrue until payment of the judgment by that defendant." Harley Davidson Motor Co. v. Advance Die Casting, Inc., 150 N.J. 489, 498 (1997) (quoting Pressler, Current N.J. Court Rules, cmt. 2 on R. 4:7-5(b) (1997)).

The statute of limitations governing a plaintiff's personal injury claim does not preclude a claim for indemnification. See Mettinger v. Globe Slicing Mach. Co., 153 N.J. 371, 387 (1998). Because there has been no judgment

entered against Dr. Lee, the statute of limitations on the vicarious liability claim against the Rancocas defendants has neither commenced nor expired.

When a plaintiff has a cause of action against two possible defendants−a tortfeasor and the person vicariously responsible for the tortfeasor's negligent actions−a plaintiff "'has the option of suing them separately in successive actions.'" Walker v. Choudhary, 425 N.J. Super. 135, 149 (App. Div. 2012) (quoting McFadden v. Turner, 159 N.J. Super. 360, 364 (App. Div. 1978)). Under the entire controversy doctrine, a party must "assert all claims known to them that stem from the same transactional facts, even those against different parties." Joel v. Morrocco, 147 N.J. 546, 548 (1997); see also Harley Davidson Motor Co., 150 N.J. at 502 ("[A] claim for common-law indemnification from a third party should ordinarily be joined in the original action because of related issued of contribution."). Although plaintiffs' medical malpractice claim and vicarious liability claim based on respondeat superior could have been asserted separately, there was nothing improper about plaintiffs' inclusion of their vicarious liability claim against the Rancocas defendants in their medical malpractice litigation under the entire controversy doctrine.

Even if we agreed that plaintiffs' claims against the Rancocas defendants sounded in medical malpractice, which we do not, the two-year statute of

limitations for a malpractice action may be enlarged under our Rules of Court. N.J.S.A. 2A:14-2(a) (noting the law may provide exceptions to the general two-year statute of limitations); see also Martinez v. Cooper Hosp. Univ. Med. Ctr., 163 N.J. 45, 52 (2000). Rule 4:9-3 allows amended pleadings if related back to the original pleading. Under this rule:

> [w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading . . . . An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party to be brought in by amendment.

Here, we are satisfied that plaintiffs' amended complaint related back to the original complaint under Rule 4:9-3. Dr. Lee was employed by one or more of the Rancocas defendants on the date of plaintiff's surgery. Plaintiffs' claims in the amended pleading arose out of the same conduct as the original complaint. Specifically, plaintiffs alleged that Dr. Lee, in his capacity as an employee of SJSC, was negligent in administering the nerve block. Additionally, Dr. Lee

testified he was a "a vested partner in Rancocas Anesthesiology." Thus, service of plaintiffs' original complaint on Dr. Lee provided sufficient notice to the Rancocas defendants of plaintiffs' vicarious liability claim against them as Dr. Lee's employers.

Nor have the Rancocas defendants articulated significant prejudice under Rule 4:9-3. Dr. Lee was named as a defendant in the original complaint and his counsel participated in the exchange of discovery, including the de bene esse deposition of plaintiff's wife.

Additionally, the Rancocas defendants did not deny employing Dr. Lee on the date of plaintiff's surgery. Because the indemnification claim asserted against the Rancocas defendants is not dependent on the proofs related to plaintiffs' medical malpractice action but flows from Dr. Lee's employment status, we discern no irreparable prejudice. As the judge aptly noted, the Rancocas defendants were not required to participate in discovery until such time as Dr. Lee was found liable, but could "if they want[ed] to participate in discovery as it applies to anything outside of the fact" that Dr. Lee was their employee.

We also reject the Rancocas defendants' claim that the judge erred in applying the discovery rule to toll the two-year statute of limitations. The

discovery rule "provides that in an appropriate case a cause of action will be held not to accrue until the injured party discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." Szczuvelek v. Harborside Healthcare Woods Edge, 182 N.J. 275, 281 (2005) (alteration in original) (quoting Lopez, 62 N.J. at 272). The judge must "identify the equitable claims of each party and evaluate and weigh those claims in determining whether it is appropriate to apply the discovery rule." Ibid. The judge then decides "whether the facts presented would alert a reasonable person exercising ordinary diligence that he or she was injured due to the fault of another. The standard is basically an objective one—whether plaintiff 'knew or should have known' of sufficient facts to start the statute of limitations running." Ibid. (quoting Martinez, 163 N.J. at 52).

Here, plaintiffs sought information from Dr. Lee regarding the identity of his employer and the malpractice insurance coverage afforded to him by that employer. Despite discovery demands, depositions, and a subpoena duces tecum, plaintiffs were unable to obtain employment and insurance information from Dr. Lee.

Because the identity of Dr. Lee's employer was not furnish when requested on multiple occasions by plaintiffs' counsel, we are satisfied the statute of

limitation was equitably tolled under the discovery rule. Tolling is expressly permitted because "[t]hose who may benefit from a statute of limitation can have no part in preventing a potential claimant from learning their identity." Bernoski v. Zarinsky, 383 N.J. Super. 127, 135 (App. Div. 2006) (quoting Dunn v. Borough of Mountainside, 301 N.J. Super. 262, 280 (App. Div. 1997)). This rationale is applicable where a potential claimant requests insurance coverage information from an employee only to be rebuffed by the employer.

The Rancocas defendants also claim that the judge erred in applying the fictitious party rule to preserve plaintiffs' vicarious liability claim in the amended complaint. We disagree.

Rule 4:26-4 provides:

> In any action . . . if the defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient for identification. Plaintiff shall on motion, prior to judgment, amend the complaint to state defendant's true name, such motion to be accompanied by an affidavit stating the manner in which that information was obtained.

The Rule requires that plaintiffs invoking the fictitious party practice satisfy the following requirements: (1) plaintiffs must not know the identity of the defendant said to be named fictitiously; (2) the fictitiously named defendant

must be described with sufficient detail to allow identification; and (3) plaintiffs must provide proof of how they learned the defendant's identity. See Baez, 453 N.J. Super. at 438-39. Additionally, the party invoking the fictitious party rule must act diligently in attempting to identify the defendant. See Matynska v. Fried, 175 N.J. 51, 53 (2002). "The purpose of the rule is to render timely the complaint filed by a diligent plaintiff, who is aware of a cause of action against an identified defendant but does not know the defendant's name." Greczyn v. Colgate-Palmolive, 183 N.J. 5, 11 (2005).

Here, plaintiffs were aware that Dr. Lee was employed by a corporate entity. Despite diligent efforts, plaintiffs were unaware of Dr. Lee's actual employer on the date of plaintiff's surgery. The conflicting information obtained during discovery indicated that Dr. Lee at one point during plaintiff's surgery was employed by one of the Rancocas defendants and, during the same surgery, he was employed by another of the Rancocas defendants.

We are satisfied that plaintiffs acted diligently in attempting to ascertain the identity of Dr. Lee's employer through discovery. Their efforts were thwarted by conflicting deposition testimony and documentary evidence. Under these circumstances, the judge properly concluded plaintiffs' amended

complaint related back to the filing of the original complaint and denied the motion for summary judgment filed by the Rancocas defendants.

We next consider the Rancocas defendants' argument that they suffered irreparable prejudice as a result of the judge's determination that plaintiffs' amended complaint related back to their original complaint. We disagree.

Here, the judge stated that the Rancocas defendants were not compelled to participate in discovery unless and until Dr. Lee was determined to be liable for plaintiff's injuries. The judge allowed the Rancocas defendants, at their election, to participate in ongoing discovery between plaintiffs and the other defendants related to the medical malpractice claims. To avoid any arguable prejudice, the judge further instructed all counsel to provide the Rancocas defendants with the discovery exchanged prior the date of plaintiffs' amended complaint. Thus, we are satisfied the Rancocas defendants did not suffer irreparable prejudice and will be able to defend against the vicarious liability and indemnification claims in the event Dr. Lee is liable for plaintiff's injury.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION