SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1743-22

MICHAEL GIANNETTA,

Plaintiff-Appellant,

v.

COUNTY OF ESSEX
DEPARTMENT OF PARKS
AND RECREATION, SOUTH
MOUNTAIN ARENA,

Defendant-Respondent.

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Submitted February 7, 2024 – December 31, 2024

Before Judges Vernoia and Walcott-Henderson.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-2145-20.

Pasquale F. Giannetta, attorney for appellant.

Jerome M. St. John, Essex County Counsel, attorneys for respondent (Lina D. O'Keefe, Section Chief, on the brief).

The opinion of the court was delivered by

WALCOTT-HENDERSON, J.S.C. (temporarily assigned).

Plaintiff Michael Giannetta appeals from an order entered on January 10, 2023, denying reconsideration of a July 8, 2022 order granting summary judgment in favor of defendant County of Essex dismissing his negligence complaint for injuries he suffered as he attempted to sit in a folding chair or seat at the Richard J. Codey Arena (Codey Arena or the Arena), a facility owned by defendant. The court granted defendant's motion for summary judgment, finding plaintiff lacked sufficient evidence establishing defendant had actual or constructive notice of the alleged defective seat in the Codey Arena under the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3. The court later denied plaintiff's motion for reconsideration.

Plaintiff appealed from the orders granting summary judgment and denying his reconsideration motion. Defendant moved to dismiss plaintiff's appeal, arguing it was filed beyond the forty-five-day time limit in Rule 2:4-1. We denied defendant's motion but directed that the appeal is limited to plaintiff's challenge to the order denying his reconsideration motion. For the following reasons, we vacate and remand for further proceedings.

I.

According to plaintiff, on January 18, 2019, he went to the Codey Arena for a high school wrestling tournament. He initially sat in a front row bleacher seat and moved over to another seat when others came to sit in the same row. Plaintiff alleged that when he moved to the second seat, he fell through the seat as he attempted to sit down, banging his elbow on the arm rest and injuring his shoulder and low back.

On March 18, 2020, plaintiff filed a complaint against defendant alleging that he was severely and permanently injured in the January 18, 2019 accident due to defendant's negligence. More particularly, plaintiff alleged defendant maintained the seating area in the Codey Arena in a negligent and careless manner by allowing the seating area to fall into disrepair thereby causing the dangerous and hazardous condition presented by the seat on which he had attempted to sit.

On April 14, 2020, defendant filed its answer admitting that the County of Essex — improperly pled as "County of Essex Department of Parks and Recreation and South Mountain Arena" — owned the property on January 18, 2019, when plaintiff is alleged to have been injured. Defendant also raised various affirmative defenses, including that plaintiff's claim is barred under the TCA.

During discovery, plaintiff served form interrogatories and three notices to produce documents on defendant. Plaintiff's first notice requested production of "all surveillance videos from [the Codey] Arena recorded on January 18, 2019." In his second request, plaintiff sought defendant's expert reports, any photographs defendant or its attorney possessed "related to this matter," all statements taken of "any witnesses to the incident," all statements given by defendant or its representatives to anyone with respect to this incident, "all incident reports and/or accident reports," and all documents "the defendant intends to produce at trial." In his third request, plaintiff sought the reports of "any and all incidents of damage to chairs/seating area in the [A]rena" prior to January 18, 2019.

In response to the initial two requests, defendant denied possessing any video surveillance from the date of plaintiff's accident and denied having retained any expert witnesses. Defendant objected to the requested production of photographs and statements claiming they fell under the attorney-work-product doctrine, and further objected to plaintiff's request for incident reports, stating the requests were overbroad and asserted the request for production of documents defendant intended to introduce at trial was "premature."

Defendant also objected to plaintiff's third discovery request, stating the request was overbroad but noting it was "not in possession of any reports of

damage to seats in Section H, Row 1 (as identified by plaintiff) for the five (5) year period preceding plaintiff's alleged date of accident." Discovery ended on March 15, 2021, and the court scheduled the trial for October 31, 2022.

On May 19, 2022, defendant moved for summary judgment, asserting plaintiff could not meet his burden of proof under the TCA because he failed to offer competent proof as to the existence of a dangerous condition that was the proximate cause of his alleged injuries and failed to establish defendant had actual or constructive notice of the alleged dangerous condition.

Defendant's summary-judgment motion was supported by a certification from Stephen Ruggiero, director of the Codey Arena, stating there was no record of "accident reports or reports of damages to seats/seating or complaints about seats/seating collapsing" from January 18, 2016, to January 17, 2019. In opposing the motion, plaintiff maintained expert testimony was not required to establish defendant's liability under the TCA.

During oral argument on the summary-judgment motion, the court noted there were no depositions taken of any representative or employee of defendant and no expert report submitted by plaintiff. The court also noted plaintiff had argued

> [defendant] had not provided the [c]ourt with any evidence of what [defendant] does with respect to

> examining the chairs or inspecting the seating arrangements or if they inspect them after each event, . . . and that the chairs have been there for [fourteen] years. And there was nothing in Mr. Ruggiero's certification that says anything about what the county does.

The court referred to Ruggiero's certification, which stated that no complaints or reports about seats collapsing had been received in three years and noted plaintiff's statements that the seat did not appear to be broken or damaged before he sat down. The court granted summary judgment in favor of defendant, finding "there was nothing in the motion record that would indicate actual notice . . . that particular chair was in a . . . dangerous condition."

The court stated "there was nothing by way of pleadings, depositions, answers to interrogatories, and admissions, together with affidavits[,] to find a question of material fact [as to] this issue." The court further found "[t]he record is just devoid of evidentiary material after the close of discovery that would allow. . . a conclusion that there is a disputed issue of material fact." The court agreed with defendant that the TCA applied and plaintiff lacked evidence showing defendant had actual or constructive notice of a dangerous condition prior to plaintiff's fall. The court concluded defendant had established its entitlement to judgment as a matter of law and granted summary

judgment in its favor, entering its order granting summary judgment on July 8, 2022.

Plaintiff filed an Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, request on July 7, 2022, seeking from defendant complaints filed between January 2015 and January 2019 regarding seating at the Codey Arena. He made the same request on July 11, 2022, three days after summary judgment was granted and more than 100 days after the discovery end date. County counsel, Olivia Schumann, denied both OPRA requests, asserting they were "complex" and "overbroad" and would require County employees to "sift through potentially infinite documents to discern which, if any were responsive" to plaintiff's requests.[1]

After the grant of summary judgment, plaintiff's counsel sought to interview Yvon Cormier, whom counsel claimed was "the person in charge of repairing seats" at the Codey Arena. Cormier was an employee of the Codey Arena working under the supervision of Ruggiero, and Cormier's responsibilities included general maintenance of the building and seat repairs.

[1] The record does not show whether plaintiff appealed the denial of his OPRA requests.

On July 27, 2022, plaintiff moved for reconsideration of the court's summary judgment order, and to re-open discovery.[2] In his supporting certification, plaintiff's counsel stated that Cormier had advised him that Cormier was responsible for repairing seats in the Arena and that he recalled making repairs to seats in the Arena prior to 2019. Additionally, plaintiff's counsel also certified that it had been brought to his attention that there were photographs depicting a number of damaged seats on a website advertising the Codey Arena. Plaintiff argued this "newly discovered information" — the interview with Cormier, and the advertising photographs — "is in direct contradiction to the responses to the discovery demands served upon [d]efendant" and, at a minimum, plaintiff should be entitled to reversal of the summary-judgment order and the reopening of his case.

On October 1, 2022, the court denied plaintiff's July 27, 2022 motion for reconsideration citing Rule 4:49-2.[3] In its terse statement of reasons denying

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[2] Although plaintiff's motion was styled as a motion for reconsideration under Rule 4:49-2, he also requested that the court vacate the order granting summary judgment in favor of defendant, while attaching a legal memorandum discussing only reconsideration.

[3] The October 1, 2022 order was "to correct [the earlier order] and reflect the court's ruling as set out in the statement of reasons" since the court had previously erroneously entered an order vacating its grant of summary judgment on September 9, 2022. Notice of the amended order was posted on January 10, 2023. Plaintiff filed his notice of appeal on February 15, 2023.

the motion for reconsideration, the court, citing Palombi v. Palombi, 414 N.J. Super. 274, 289 (App. Div. 2010), stated, "the magnitude of error cited must be a 'game-changer' for reconsideration to be appropriate," which was not the case here because "plaintiff did not articulate any basis for reconsideration." In its statement of reasons, the court also noted the discovery period had run and plaintiff had not shown any basis for the court to find reconsideration was warranted.

Plaintiff appealed from the orders granting summary judgment in favor of defendant and denying reconsideration. Defendant filed an emergent motion to dismiss the appeal, contending plaintiff's appeal was untimely as to the summary-judgment order. In an order dated March 16, 2023, we denied defendant's motion to dismiss plaintiff's appeal in its entirety, but limited plaintiff's appeal solely to the order denying plaintiff's motion for reconsideration.

Plaintiff argues the following point for our consideration:

> POINT I
>
> THE COURT ERRED IN DENYING THE MOTION FOR RECONSIDERATION.
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> > A. The substance of plaintiff's reconsideration motion entitled plaintiff to relief for the reasons maintained below and under R[ule] 4:50-1(a) and (e).

B. The trial court erred by denying the request to extend discovery.

II.

A court's reconsideration decision will be left undisturbed unless it represents a clear abuse of discretion. Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283 (1994). 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) (quoting Achacoso-Sanchez v. Immigration & Naturalization Serv., 779 F.2d. 1260, 1265 (7th Cir. 1985)). "When examining a trial court's exercise of discretionary authority, [reviewing courts] reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 (App. Div. 2007)).

Motions for reconsideration from final orders are governed by Rule 4:49-2 and decided based on the court's exercise of its sound discretion. Capital Finance Co. of Del. Valley, Inc. v. Asterbadi, 398 N.J. Super. 299, 310 (App. Div. 2008). Rule 4:49-2 provides

> a motion for rehearing or reconsideration seeking to alter or amend a judgment or final order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or final order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.
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> [R. 4:49-2.]

"A litigant should not seek reconsideration merely because of dissatisfaction with a decision of the court," and a court should grant reconsideration only where either "1) the court 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." Asterbadi, 398 N.J. Super. at 310 (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)).

Reconsideration cannot be used to expand the record and reargue a motion. Ibid. "A motion for reconsideration is designed to seek review of an order based on the evidence before the court on the initial motion . . . not to serve as a vehicle to introduce new evidence to cure an inadequacy in the motion record." Ibid. (citing Cummings v. Bahr, 295 N.J. Super. 374, 384

(App. Div. 1996)). However, if a litigant wishes to bring new or additional information to the court's attention, which it could not have provided on the first application, the court should, in the interest of justice (and in the exercise of sound discretion), consider the evidence. D'Atria, 242 N.J. Super. at 401.

A plaintiff asserting a cause of action for negligence must present evidence establishing a duty of care, breach of the duty, actual and proximate causation, and damages. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (citing Jersey Cent. Power & Light Co. v. Melcar Util. Co., 212 N.J. 576, 594 (2013)). "[N]egligence is a fact which must be shown and which will not be presumed." Franco v. Farleigh Dickinson Univ., 467 N.J. Super. 8, 25 (App. Div. 2021) (quoting Long v. Landy, 35 N.J. 44, 54 (1961)). "The mere showing of an incident . . . is not alone sufficient to authorize the finding of an incident of negligence." Ibid. (alteration in original) (quoting Long, 35 N.J. at 54). Plaintiffs must demonstrate negligence "by some competent proof[,]" and the failure to do so warrants dismissal. Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Davis, 219 N.J. at 406).

In addition to these general principles, our Legislature has declared "that public entities could only be held liable for negligence 'within the limitations of [the TCA].'" Stewart v. N.J. Turnpike Authority/Garden State Parkway, 249 N.J. 642, 655 (2022) (alteration in original) (quoting N.J.S.A. 59:1-2). Under

the TCA, immunity is "the general rule and liability is the exception." Ibid. (quoting Coyne v. Dep't of Transp., 182 N.J. 481, 488 (2005)). "[T]he burden is on the public entity both to plead and prove its immunity . . . ." Henebema v. S. Jersey Transp. Authority, 430 N.J. Super. 485, 501 (App. Div. 2013) (first alteration in original) (quoting Kolitch v. Lindedahl, 100 N.J. 485, 497 (1985)).

To impose liability on a public entity for a dangerous condition of its property pursuant to N.J.S.A. 59:4-2, a plaintiff must establish the existence of a "dangerous condition." Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119, 125 (2001). A "dangerous condition" is a condition of property "that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." N.J.S.A. 59:4-1(a).

The TCA imposes liability on the public entity only when it had actual or constructive notice of the dangerous condition. N.J.S.A. 59:4-2. "These elements are 'accretive; if one or more of the elements is not satisfied, a plaintiff's claim against a public entity alleging that such entity is liable due to the condition of public property must fail.'" Stewart, 249 N.J. at 656 (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 585 (2008)).

Here, plaintiff argues the court erred in denying his motion for reconsideration. He also argues that although he did not "specifically articulate" Rule 4:50-1 as a basis for his motion for reconsideration, he "should not be foreclosed from consideration of the merits of his arguments on reconsideration" based on newly discovered evidence under that Rule.

In pertinent part, Rule 4:50-1 provides,

> On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons:
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> > (a) mistake, inadvertence, surprise, or excusable neglect;
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> > (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49;
> >
> > . . . .
> >
> > (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application. . . .

[R. 4:50-1 (a) to (b), (e).][4]

Relief under Rule 4:50-1(b) requires a showing of newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under Rule 4:49. DEG, LLC v. Twp. of Fairfield, 198 N.J. 242, 264 (2009). "To obtain relief from a judgment based on newly discovered evidence, the party seeking relief must demonstrate 'that the evidence would probably have changed the result, that it was unobtainable by the exercise of due diligence for use at the trial, and that the evidence was not merely cumulative.'" Ibid. (quoting Quik Chek Food Stores v. Twp. of Springfield, 83 N.J. 438, 445 (1980)). All three requirements must be met. Ibid. In DEG, the plaintiff argued various documents were newly discovered and therefore entitled it to relief under Rule 4:50-1(b). Ibid. Our Court found there was nothing in the record to show the information now relied on "was, in fact, unobtainable pre-

[4] Confusingly, plaintiff cites only Rule 4:50-1(a) — "mistake, inadvertence, surprise, or excusable negligence" — and (e) — "the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application" — in his brief headings, but he provides case law discussing Rule 4:50-1(b) and he argues he is entitled to relief under the Rule based on his alleged "newly discovered evidence."

judgment." Ibid. The documents themselves were dated pre-judgment with sufficient time for the plaintiff to obtain an expert of its own. Ibid.

Plaintiff relies on information he claims to have collected following the close of discovery and after the court granted the summary-judgment motion. This purported "newly discovered evidence" includes plaintiff's investigator's conversation with Cormier and photographs from a website allegedly depicting broken seats. He also argues his certification submitted in support of the motion for reconsideration "unequivocally demonstrates newly discovered evidence and a change in circumstances flowing from [d]efendant's affirmative subversion of discovery obligations and knowing withholding of evidence." Plaintiff further states "it is obvious . . . that the information provided by . . . Ruggiero, and in response to discovery requests, is false and was intended to mislead and subvert [p]laintiff's lawsuit."

Defendant asserts plaintiff provides no details surrounding the "discovery of [] Cormier other than to claim [plaintiff] was simply made 'aware' of him," arguing plaintiff failed to show he was unable to obtain the evidence during the 700 days of discovery. Defendant also asserts plaintiff did not serve any discovery demands other than the three requests for documents and form interrogatories and plaintiff therefore had never sought, for example,

depositions of any representatives of defendant with knowledge of topics relevant to his claims or defendant's affirmative defenses.

Applying the requisite standard, given plaintiff's motion was filed as a motion for reconsideration, we conclude the court abused its discretion by denying the motion without providing a rational decision supported by the findings of fact and conclusions of law required under Rule 1:7-4. Flagg, 171 N.J. at 571. "Naked conclusions do not satisfy the purpose of R. 1:7-4. Rather, the trial court must state clearly its factual findings and correlate them with the relevant legal conclusions." Curtis v. Finneran, 83 N.J. 563, 570 (1980). What is of particular concern is that the court did not address, decide, or consider plaintiff's claim that the reason he had not sought to depose or obtain information concerning Cormier is because defendant's discovery responses failed to properly disclose him as an individual with knowledge of the condition of, and repairs made to, the Arena's seats. Plaintiff argued it was only his happenstance discovery of Cormier after summary judgment had been entered that he and his counsel became aware of Cormier and his responsibilities at the Arena. And it was defendant's failure to properly disclose Cormier in response to the interrogatories that had been served, and not any lack of diligence, that resulted in his failure to learn about Cormier or take action to depose him within the discovery period.

We do not offer any opinion on the merits of plaintiff's claims. We observe only that in deciding plaintiff's reconsideration motion, the court made no findings concerning arguments and, as a result, it appears the court failed to consider them and make the requisite findings concerning them as required under Rule 1:7-4 for appropriate appellate review. See Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Curtis, 83 N.J. at 569-70) (stating a court's "[f]ailure to make explicit findings and clear statements of reasoning 'constitutes a disservice to litigants, the attorneys, and the appellate court'").

Based on those circumstances, we vacate the order denying plaintiff's reconsideration motion and remand for the court to reconsider its disposition of the reconsideration motion, its denial of plaintiff's request to extend discovery, and issuance of a decision that includes findings of fact and conclusions of law on those requests based on the record presented.[5] R. 1:7-4. The court on remand may conduct such proceedings as it deems appropriate, including oral argument and additional submissions from the parties. Our decision to remand for those purposes shall not be interpreted as expressing an opinion on the merits of any of the issues presented.

[5] To the extent plaintiff's motion had sought relief under Rule 4:5-1, the court shall reconsider its disposition of that request as well.

Vacated and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION