SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2650-22

ESTATE OF ELIZABETH KLOSSEK, by her administrator ad prosequendum, SHARON DESOUSA,

Plaintiff-Appellant,

v.

OCEAN CONVALESCENT CENTER, INC., d/b/a ROSE GARDEN NURSING AND REHABILITATION CENTER, and ANDREW SHAWN,

Defendants-Respondents.

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Submitted May 30, 2024 – Decided June 10, 2024

Before Judges Firko and Vanek.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-0986-22.

Bradley T. Haney (Napoli Shkolnik, PLLC), attorney for appellant.

Hall Booth Smith, PC, attorneys for respondents Ocean Convalescent Center, Inc., d/b/a Rose Garden Nursing Center and Andrew Shawn (Matthew James Lang and Dorine Sirota, on the brief).

PER CURIAM

In this nursing home negligence case, plaintiff Sharon Desousa—as administrator ad prosequendum of the estate of her late mother, Elizabeth Klossek—appeals from the February 7, 2023 order dismissing her complaint with prejudice.[1] Because we see no error in the trial court's determination that plaintiff failed to file an affidavit of merit (AOM) within the 120-day statutory period proscribed under N.J.S.A. 2A:53A-27, we affirm.

I.

We glean the following facts material to our disposition from the record. Klossek resided at the Ocean Convalescent Center, doing business as Rose Garden Nursing and Rehabilitation Center (Rose Garden), a long-term care facility in Toms River, from February 10, 2019 until her death on May 11, 2020.

[1] Plaintiff's notice of appeal lists only the February 7, 2023 order as being appealed, while the case information statement references both the February 7 and April 14, 2023 orders. Plaintiff did not present any legal argument regarding the April 14, 2023 order in her merits brief. Thus, our disposition does not address the entry of that order. See Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011).

During that time period, Andrew Shawn served as the administrator responsible for the oversight of residents' care.

As this court has recognized previously, our State was deeply impacted by the COVID-19 pandemic beginning in early 2020. See Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 17 (App. Div. 2022), certif. denied sub nom., MAC Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 252 N.J. 258 (2022). Our citizens who were elderly or immunocompromised were at an even higher risk during this difficult time. Exec. Order No. 122 (Apr. 8, 2020), 52 N.J.R. 959(a) (May 4, 2020).

On May 11, 2020, Klossek died after contracting COVID-19. She was ninety-nine years old. Plaintiff attributes Klossek's death to the "careless, reckless, and negligent conduct of [d]efendants, their medical doctors, nurses, physician's assistants, and other medical professionals, and/or administrators, and/or aides, and/or sanitation workers, and/or orderlies[,] and/or food preparation employees, and/or security officers."

On April 12, 2022, plaintiff filed an eight-count complaint, which named Rose Garden and Shawn as defendants, alleging they failed to provide adequate

care afforded to nursing home patients in violation of N.J.S.A. 30:13-5,[2] N.J.A.C. 8:34-1.1 to -1.6,[3] and N.J.A.C. 8:52-3.1 to -3.2[4] (count one); negligence (counts two and three); pain and suffering (count four); wrongful death (count five); gross negligence (count six); and nursing home malpractice (counts seven and eight). On June 20, 2022, defendants filed their answer and counterclaim, denying plaintiff's allegations, claiming immunity to COVID-19-related prosecution, and asserting they were "entitled to dismissal with prejudice of all allegations against [them] upon [p]laintiff's failure to provide a proper Affidavit of Merit pursuant to N.J.S.A. 2A:53A-27."

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[2] N.J.S.A. 30:13-5 sets forth the "[r]ights of nursing home residents," which include "the right to a safe and decent living environment and considerate and respectful care that recognizes the dignity and individuality of the resident, including the right . . . care consistent with sound nursing and medical practices." N.J.S.A. 30:13-5(j).

[3] N.J.A.C. 8:34-1.1 to -1.6 "contains rules for licensing nursing home administrators and rules regulating the operation of the Nursing Home Administrators Licensing Board." N.J.A.C. 8:34-1.1(a).

[4] N.J.A.C. 8:52-3.1 to -3.2 sets forth the "core functions of public health" as required to be performed by service providers throughout the state. N.J.A.C. 8:52-3.2(a).

On October 19, 2022, the trial court held a Ferreira[5] conference. At the conclusion of the conference, the trial court entered a written order extending plaintiff's deadline to file an AOM to the statutory maximum of 120 days, but noting "[i]n doing so, the [c]ourt is cognizant that the 120[-]day time limit may have already expired based upon the answers having been filed on or about June 20, 2022." The order instructed plaintiff to file an AOM on or before November 2, 2022, and reserved on the issue of whether an AOM filed by that deadline would be timely under the applicable statutes.

On November 4, 2022, plaintiff filed an AOM authored by a registered nurse and licensed nursing home administrator. On November 14, 2022, defendants moved to dismiss the complaint for lack of subject-matter jurisdiction and failure to state a claim, Rule 4:6-2(a) and (e). Plaintiff opposed.

On February 7, 2023, the trial court entered an order granting defendants' motion and dismissing plaintiff's complaint with prejudice under Rule 4:6-2(e). The accompanying written statement of reasons sets forth plaintiff filed an AOM 137 days after defendants' answer was filed. Because no exception to N.J.S.A.

[5] Pursuant to Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 155 (2003), in a medical malpractice case, a Ferreira conference allows "the court [to] address all discovery issues, including whether an [AOM] has been served on defendant."

2A:53A-27 applied, the AOM was deemed untimely and plaintiff's complaint was dismissed with prejudice. The trial court did not reach defendants' other arguments in favor of dismissal under Rule 4:6-2(a). Plaintiff's motion for reconsideration, arguing the trial court improperly scheduled the Ferreira conference after the statutory deadline had already passed, was denied.

This appeal follows.

II.

On appeal, plaintiff asserts her complaint does not require submission of an AOM because the underlying claims are based on common knowledge and since the trial court erred in its classification of Rose Garden as a health care facility. Plaintiff also revives the argument proffered to the trial court in support of the reconsideration motion that the required Ferreira conference was improperly scheduled after the statutory deadline had already passed.

We review a trial court's decision to grant a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 4:6-2(e) de novo. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021). When considering a Rule 4:6-2(e) motion, "[a] reviewing court must examine 'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Ibid. (quoting

Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, PC, 237 N.J. 91, 107 (2019)); see also Wreden v. Township of Lafayette, 436 N.J. Super. 117, 124-25 (App. Div. 2014) ("in determining whether dismissal under Rule 4:6-2(e) is warranted, the court should not concern itself with plaintiffs' ability to prove their allegations").

"Dismissals under Rule 4:6-2(e) are ordinarily without prejudice." Mac Prop., 473 N.J. Super. at 17. However, there are times when a dismissal with prejudice is mandated, such as when the facts are "palpably insufficient to support a claim upon which relief can be granted" and when "discovery will not give rise to" a successful claim. Ibid. (first quoting Rieder v. State, 221 N.J. Super. 547, 552 (App. Div. 1987); and then quoting Dimitrakopoulos, 237 N.J. at 107).

"[W]hether plaintiff satisfied the AOM statute is a matter of statutory interpretation for which our standard of review is de novo." Hoover v. Wetzler, 472 N.J. Super. 230, 235 (App. Div. 2022). "Where a statute is clear and unambiguous on its face and admits of only one interpretation, a court must infer the Legislature's intent from the statute's plain meaning." O'Connell v. State, 171 N.J. 484, 488 (2002). "On the other hand, if there is ambiguity in the statutory language that leads to more than one plausible interpretation, we may

turn to extrinsic evidence, 'including legislative history, committee reports, and contemporaneous construction.'" DiProspero v. Penn, 183 N.J. 477, 492-93 (2005) (quoting Cherry Hill Manor Assocs. v. Faugno, 182 N.J. 64, 75 (2004)).

N.J.S.A. 2A:53A-27 provides:

> In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within [sixty] days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed [sixty] days, to file the affidavit pursuant to this section, upon a finding of good cause.

The AOM prerequisite allows the court to require the plaintiff "to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early state of litigation." Fink v. Thompson, 167 N.J. 551, 559 (2001) (quoting In re Petition of Hall, 147 N.J. 379, 391 (1997)). "[W]here a plaintiff fails to provide an [AOM] within the statutorily mandated timeframe, it shall be deemed a failure to state a cause of action unless the plaintiff satisfies an exception to the [AOM] requirement." Cowley v. Virtua

Health Sys., 242 N.J. 1, 23 (2020). Absent an exception, failing "to state a cause of action under N.J.S.A. 2A:53A-29 . . . requires dismissal with prejudice for noncompliance." Ibid.

In claims that require an AOM, the trial court is required to conduct a Ferreira conference to allow the parties to raise and address issues pertaining to the sufficiency of the AOM within ninety days of the defendant's answer. A.T. v. Cohen, 231 N.J. 337, 346 (2017). The Legislature requires an AOM to "facilitate the weeding-out of frivolous lawsuits." Ibid.

III.

As a threshold matter, plaintiff asserts the trial court improperly applied N.J.S.A. 2A:53A-27 because Rose Garden is not a "health care facility" within the purview of the AOM statute. We disagree.

The AOM requirement in N.J.S.A. 2A:53A-27 applies to "alleged act[s] of malpractice or negligence by a licensed person in his [or her] profession or occupation." The AOM statutory definitions set forth a "licensed person" includes a "health care facility." N.J.S.A. 2A:53A-26(j). Under N.J.S.A. 26:2H-2(a), "a health care facility" is one that

> provid[es] services for health maintenance organizations, diagnosis, or treatment of human disease, pain, injury, deformity, or physical condition, including, but not limited to, a general hospital, special

> hospital, mental hospital, public health center, diagnostic center, treatment center, rehabilitation center, extended care facility, skilled nursing home, nursing home, intermediate care facility, tuberculosis hospital, chronic disease hospital, maternity hospital, outpatient clinic, dispensary, home health care agency, residential health care facility, dementia care home, and bioanalytical laboratory (except as specifically excluded hereunder), or central services facility serving one or more such institutions but excluding institutions that provide healing solely by prayer and excluding such bioanalytical laboratories as are independently owned and operated . . . .

Plaintiff asks this court to distinguish Rose Garden from the facilities included in the definition of "health care facility" because Rose Garden is a "long-term care facility" not explicitly listed within the text of N.J.S.A. 26:2H-2(a). Under N.J.S.A. 26:2H-2(a), the definition of "health care facility" "include[es], but [is] not limited to" those facilities explicitly mentioned. The statute already specifies that it does not apply to "institutions that provide healing solely by prayer" or certain "bioanalytical laboratories." Had the Legislature intended to exempt long-term care facilities from the AOM requirement, it would have specified so in the list of exceptions. See Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 112 (2004) (explaining "[t]he canon of statutory construction, expressio unius est exclusio alterius—expression of one thing suggests the exclusion of another left unmentioned" dictates some

omissions by the Legislature are to be construed as intentional); GE Solid State v. Dir., Div. of Tax., 132 N.J. 298, 308 (1993) (explaining when the Legislature includes explicit mention of one exclusion, it is implied not to pertain to another).

We see no error in the trial court's conclusion that the definition of health care facility includes a long-term care facility as a "facility or institution . . . that is engaged principally in providing services for health maintenance organizations, diagnosis, or treatment of human disease, pain, injury, deformity, or physical condition." Moreover, the licensing framework to establish a "long-term care facility" sets forth "long-term care facilities [are] commonly known as nursing homes."[6] N.J.A.C. 8:39-1.1(a). N.J.S.A. 26:2H-2(a) also explicitly includes "nursing home" as falling within the definition of "health care facility."

We affirm the trial court's threshold determination that Rose Garden is a health care facility subject to the AOM requirements under N.J.S.A. 2A:53A-27.

IV.

[6] Plaintiff's argument the complaint was brought under the New Jersey Nursing Home Responsibilities and Residents' Rights Act (NHA), N.J.S.A. 30:13-1 to -17 and reference to Rose Garden as a "nursing home" numerous times contradicts her assertion that Rose Garden was a long-term care facility that did not constitute a nursing home subject to the AOM statute.

We turn to review whether the trial court erred in concluding no exception to the AOM requirement applies. Absent an exception, we are constrained to affirm the trial court's with-prejudice dismissal because our binding case law is clear that failing to supply the AOM within 120 days "requires dismissal with prejudice for noncompliance." Cowley, 242 N.J. at 23.

Plaintiff argues the trial court erred in finding there were no applicable exceptions to the AOM requirement based on extraordinary circumstances and common knowledge. Traditionally, the sixty-day deadline to file an AOM, extendable by sixty days for good cause to a maximum of 120 days, is subject only "to the long-established AOM exceptions for (1) substantial compliance or (2) extraordinary circumstances." Yagnik v. Premium Outlet Partners, LP, 467 N.J. Super. 91, 96 (App. Div. 2021).

The trial court may consider extending the deadline if the plaintiff demonstrates "extraordinary circumstances" for a late-filed AOM. Id. at 114. Plaintiff asserts the trial court's delay in scheduling a Ferreira conference until after the 120-day deadline had lapsed constitutes an exceptional circumstance. We previously rejected this argument and concluded that a delay in the scheduling of a Ferreira conference "is not 'a tolling device.'" A.T., 231 N.J. at 347 (quoting Paragon Contractors, Inc. v. Peachtree Condo. Ass'n, 202 N.J. 415,

419 (2010)). Furthermore, a Ferreira conference "was never intended, nor could it have been, as an overlay on the statute that would effectively extend the legislatively prescribed filing period." Paragon, 202 N.J. at 419.

> At issue here is what effect the failure to hold a Ferreira conference will have on the time limits prescribed in the statute. The answer is none. It is true that we created and mandated the Ferreira conference to "remind the parties of the sanctions that will be imposed if they do not fulfill their obligations." Ferreira, 178 N.J. at 147. Our clear purpose was to help attorneys and litigants to avoid the dismissal of meritorious claims.
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> [Id. at 424.]

In the alternative, plaintiff asserts defendants delayed turning over Klossek's medical charts and this dilatory behavior constitutes an exceptional circumstance warranting relief from the time-bar of the AOM statute. While there may be "no one-size-fits-all definition of what constitutes extraordinary circumstances to warrant an extension of time to file an AOM beyond the filing deadline[,]" Gonzalez v. Maher Ibrahim, 477 N.J. Super. 647, 657 (App. Div. 2024), we are unpersuaded that plaintiff has made a showing the exception should apply here.

The Court has provided guidance as to what does not constitute exceptional circumstances based upon "a fact-sensitive [case-by-case] analysis."

Tischler v. Watts, 177 N.J. 243, 246 (2003) (alteration in original) (quoting Hartsfield v. Fantini, 149 N.J. 611, 618 (1997)).

> Extraordinary circumstances do not exist due to: an "undisputed pattern of inattentiveness" and "outright ignorance" by an attorney of requirements under the AOM statute, Estate of Yearby v. Middlesex County, 453 N.J. Super. 388, 404-07 (App. Div. 2018); the sole fact that the trial court failed to hold a Ferreira conference, [Paragon, 202 N.J. at 426]; [or] a delay in obtaining the plaintiff's medical records, Davies v. Imbesi, 328 N.J. Super. 372, 377-78 (App. Div. 2000)[.] (emphasis omitted).
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> [Gonzalez, 477 N.J. Super. at 657-58.]

V.

As we conclude there are no exceptional circumstances justifying relief from the statutory mandate, we turn to plaintiff's next assertion that no AOM is needed in this case since the standard of care owed by nursing homes is so obvious. There may be "exceptionally rare cases in which the common knowledge exception applies [if] an expert is not needed to demonstrate a defendant professional breached some duty of care 'where the carelessness of the defendant is readily apparent to anyone of average intelligence.'" Cowley, 242 N.J. at 17 (quoting Rosenberg v. Cahill, 99 N.J. 318, 325 (1985)); see also Hubbard v. Reed, 168 N.J. 387, 394 (2001) ("[I]n common knowledge cases[,] an expert is not needed to demonstrate that a defendant breached a duty of

care."). After careful consideration, we conclude the common knowledge exception does not apply.

The common knowledge exception "applies where 'jurors' common knowledge as lay persons is sufficient to enable them, using ordinary understanding and experience, to determine a defendant's negligence without the benefit of the specialized knowledge of experts.'" Cowley, 242 N.J. at 17 (quoting Hubbard, 168 N.J. at 394). Our case law establishes the common knowledge exception is properly applied in cases that "involve obvious or extreme error," id. at 290 (citing Bender v. Walgreen E. Co., 399 N.J. Super. 584, 590 (App. Div. 2008)), such as: Hubbard, 168 N.J. at 396, where a dentist extracted the wrong tooth; Estate of Chin v. Saint Barnabas Med. Ctr., 160 N.J. 454, 471 (1999), where a doctor pumped gas instead of fluid into a patient's uterus; and Bender, 399 N.J. Super. at 590-91, where a pharmacist filled a prescription with medications other than the drug prescribed.

We disagree with plaintiff that the standards applicable to her claims fall into this narrow exception. Plaintiff asserts it "does not take an expert to determine whether basic COVID preventative measures should have been implemented at the height of the pandemic" because "[i]n the early stages of the pandemic, laypeople became intimately familiar with basic preventative

infection protocol for COVID-19, including social distancing, washing hands, and wearing masks."

As the trial court cogently explained, the common knowledge exception does not apply here because "[t]he claim[s'] underlying factual allegations require proof of a deviation from the professional standard of care." Plaintiff presents no case law suggesting community awareness—specifically, precautions recommended for individuals to avoid exposure to COVID-19—renders the medical protocol a health care facility must follow during a pandemic within common knowledge. We decline to extend this narrowly tailored exception to the broad application plaintiff suggests.

VI.

We reject plaintiff's conflation of the AOM requirement with the prohibition against expert testimony on issues of law. Plaintiff appears to argue an AOM is not needed because experts cannot testify on questions of law pursuant to State v. Grimes, 235 N.J. Super. 75, 80 (App. Div. 1989) ("Expert opinion testimony is not admissible concerning the domestic law of the forum."). "[T]he trial judge has the exclusive responsibility to instruct the jury on the law to be applied to avoid the 'danger . . . that the jury may think that the "expert" in the particular branch of the law knows more than the judge[.]'" Ptaszynski v.

Atl. Health Sys., 440 N.J. Super. 24, 37 (App. Div. 2015) (second and third alterations in original) (quoting Grimes, 235 N.J. Super. at 80). Plaintiff fails to establish how an AOM as to the non-frivolous medical basis for a cause of action constitutes inadmissible expert testimony on an issue of law.

To the extent plaintiff attempts to segregate a statutory claim under the NHA from the obligation to comply with the AOM statute, we have previously concluded there is no private right of action under the NHA "for the alleged failure by [a nursing home] to fulfill its responsibility . . . to comply with all applicable state and federal statutes, rules and regulations." Ptaszynski, 440 N.J. Super. at 36. We have, however, applied the AOM requirement to plaintiff's common law claim that the defendants deviated from the standard of medical care and conclude plaintiff's non-compliance with the AOM requirement warranted dismissal.

Affirmed.