SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0159-20

SHAWN BOVASSO,

Plaintiff-Appellant,

v.

CARE CENTER DROP IN, individually and d/b/a PARK PLACE, PROGRAM FOR ADULTS,[1]

Defendant-Respondent.

Submitted May 9, 2022 – Decided May 20, 2022

Before Judges Sabatino and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-0464-19.

Antonio J. Toto, attorney for appellant.

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[1] According to defendant's responding brief on appeal, plaintiff has misidentified defendant's name, which should be Jersey Shore University Behavioral Health i/p/a Care Center Drop In, d/b/a Park Place Program For Adults ("Park Place").

Garvey Ballou, P.A., attorney for respondent (Robert Ballou, on the brief).

PER CURIAM

Plaintiff Shawn Bovasso appeals the trial court's August 12, 2020 order granting defendant[2] Park Place's motion for summary judgment and dismissing his negligence complaint. We affirm.

We briefly summarize the facts from the summary judgment record, viewing them in a light most favorable to plaintiff. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Plaintiff, then age forty-six, was attending defendants' outpatient health care facility for severely depressed and other mentally ill adults. On September 15, 2017, plaintiff fractured his tibia when he climbed a fence to retrieve a frisbee that another person had tossed over the other side. The fracture occurred as plaintiff dropped from the fence to the ground below.

According to plaintiff's complaint, defendants negligently failed to supervise him when he was out in the yard. He further contends defendants should have rescued him when he was stranded on the fence.

[2] In addition to Park Place, the complaint also lists various fictitiously named defendants.

Plaintiff did not retain a liability expert to address the standards of care for supervising persons receiving services at such a mental health facility. He failed to serve a report on defendant from such an expert before the discovery period closed. Plaintiff also did not serve an affidavit of merit ("AOM").

Defendant moved for summary judgment on two grounds: (1) plaintiff's failure to produce an AOM, and (2) plaintiff's failure to retain an expert to establish that defendant deviated from the pertinent standards of care.

In opposing the motion, plaintiff argued the negligence issues in this case are matters of common knowledge, so that a jury can evaluate the pertinent standards of care and issues of liability without any expert testimony. He further argued that no AOM was necessary, either.

The trial court granted summary judgment. In his written statement of reasons, Judge Henry P. Butehorn first ruled that no AOM was necessary because defendant had not shown they are "licensed professionals" in the enumerated categories covered by the AOM statute, N.J.S.A. 2A:53A-26-29. Defendant has not cross-appealed that ruling.[3]

[3] Because defendant did not cross-appeal, we ignore the portion of defendant's merit's brief asserting the trial court erred in ruling no AOM was required. See, e.g., Bacon v. New Jersey State Dep't of Educ., 443 N.J. Super. 24, 38 (App. Div. 2015); Borough of Berlin v. Remington & Vernick Engineers, 337 N.J. Super. 590, 596 (App. Div. 2001).

The judge did grant summary judgment on the second asserted ground, finding that plaintiff cannot get to a jury without an expert opining there were deviations from standards of care of such a facility. The judge's written opinion analyzed this point as follows:

> Plaintiff's claim is based upon his presence at defendant's premises and that he needs some degree of supervision. It is also based upon the allegation he should be prevented from climbing a fence.
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> . . .
>
> Plaintiff expressly references himself as a "patient." Plaintiff is an adult; he is 47 years old. Plaintiff's claim is based upon those persons at the defendant's facility, such as plaintiff, and defendant "specializ[ing] in people who suffer from significant depression as [plaintiff]."
>
> Even if not a claim for medical malpractice, whether or not someone of plaintiff's age requires supervision while outside because of significant depression and, if so, what extent of supervision is required is not something within the common ken of average juror. It requires an understanding of plaintiff's depression and the circumstances why, or under what circumstances, depression (or other condition) requires supervision and the level of same; as noted, plaintiff characterizes himself as a "patient."
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> . . .
>
> However, the circumstances under which supervision is required, or preventing an adult from climbing a fence

> based upon any medical or psychological condition, is not within the common understanding of a juror.
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> . . .
>
> Expert testimony on those matters is required from a person who has experience and training in education and the supervision of such persons. The foregoing conclusion is strengthened if plaintiff were considered, as self-described in this motion, a "patient."
>
> [(Emphasis added).]

On appeal, plaintiff reiterates his contention that defendant's alleged negligence in this setting is a subject of common knowledge, and that he did not need to retain an expert to address that subject.

We review the trial court's summary judgment ruling de novo. Rozenblit v. Lyles, 245 N.J. 105, 121 (2021). Our task is to "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540; see also R. 4:46-2(c). To grant the motion, courts must find that the evidence in the record "is so one-sided that one party must prevail as a matter of law." Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). We agree with defendant that this is such a one-

sided situation, because of plaintiff's failure to present a report from a necessary liability expert.

Pursuant to N.J.R.E. 702, admissible expert testimony "concerns a subject matter that is 'so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman.'" Jacobs v. Jersey Cent. Power & Light Co., 452 N.J. Super. 494, 505 (App. Div. 2017) (emphasis added) (quoting Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. 1 on N.J.R.E. 702 (2017)).

Expert testimony is not necessary when a jury is capable of understanding the concepts in a case "utilizing common judgment and experience." Ibid. (quoting Campbell v. Hastings, 348 N.J. Super. 264, 270 (App. Div. 2002)); see also Mayer v. Once Upon A Rose, Inc., 429 N.J. Super. 365, 375-77 (App. Div. 2013) (holding that an expert's opinion on the physical properties of glass was not required to support plaintiff's claim that a negligently held a glass vase and caused it to shatter). By contrast, "expert testimony is required when 'a subject is so esoteric that jurors of common judgment and experience cannot form a valid conclusion.'" Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 450 (1993) (quoting Wyatt by Caldwell v. Wyatt, 217 N.J. Super. 580, 591 (App. Div. 1987)); see also Ford Motor Credit Co., LLC v. Medola, 427 N.J. Super. 226,

239 (App. Div. 2012) (requiring a qualified expert to opine on esoteric issues involving a complex instrumentality to determine why car engine seized).

Here, the motion judge correctly found plaintiff's theory of defendant's negligence—that it failed to supervise him adequately on the grounds of the facility—is not a subject matter of common knowledge. To the contrary, the subject is esoteric and "beyond the ken" of average citizens who do not possess specialized knowledge and training. Among other things, a jury would need to ponder such topics as staffing ratios and the intensity and frequency of appropriate supervision within a facility like this one, which serves residents with extreme depression and other mental illnesses.

The Supreme Court's very recent opinion in Haviland v. Lourdes Medical Center of Burlington County, Inc., __ N.J. __ (2022) reinforces these principles. As the Court noted in Haviland, even in situations where an AOM is not required under the statute, a plaintiff may still need to present expert testimony to educate the jurors about the industry's standards of care. Id. (slip op. at 21-22).

In Haviland, a claim of negligence was asserted against a radiology technician, who is not a "licensed professional" under the AOM statute but whom nevertheless is guided by occupational standards of care. Id. (slip op. at 3). The Court observed that the plaintiff in that case would need to present an

expert witness at trial to address the standards of care of the relevant occupation. Id. (slip op. at 21-22).

The same is true here. Jurors should not be allowed to speculate about the standards of care for staffing and supervision at a mental health facility such as the one operated by defendant. The motion judge correctly found that plaintiff needed a liability expert to support his claims. Because he failed to provide such an expert report within the discovery period, his claims are unsupportable at a trial and were appropriately dismissed.

Affirmed.