NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3773-14T3

KAREN A. BAUM and
CLIFFORD G. BAUM,

Plaintiffs-Appellants,

v.

HARRY JOHN CONIARIS, LLC, a Limited Liability Company authorized to do business in the State of New Jersey, and HARRY JOHN CONIARIS, M.D.,

Defendants-Respondents.

Submitted August 9, 2016 – Decided August 17, 2016

Before Judges Ostrer and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2663-13.

Allegra Law Firm, LLC, attorneys for appellants (Edward A. Allegra, of counsel; Elizabeth Loud-Hayward, on the brief).

Russell Macnow, LLC, attorney for respondents (David P. Silber, on the brief).

PER CURIAM

Plaintiffs Karen and Clifford Baum appeal from an order entered by the Law Division judge granting summary judgment in favor of defendants Harry John Coniaris, LLC, and Harry John Coniaris, M.D. The complaint was dismissed for failure to

provide an expert report supporting their claim against defendants for negligence. Plaintiffs alleged that defendants negligently allowed "severe overcrowding in [defendants'] waiting room" which caused Karen Baum (plaintiff) to trip, fall and suffer a broken ankle. We affirm.

The relevant facts are essentially undisputed. On August 1, 2011, plaintiff was seated in defendants' waiting room for a scheduled eye examination. The waiting room was "small" and occupied by approximately ten people. Plaintiff characterized the waiting room as "extremely crowded" and "severe[ly] overcrowd[ed.]" One of the patients in the waiting room was seated in a wheelchair, positioned in the aisle in front of a table. Plaintiff was aware of the wheelchair's location. When plaintiff was called for her examination, she "got up" and "tripped on the wheelchair." Plaintiff alleges she suffered a broken ankle as a result of the fall. Defendants deny that plaintiff's ankle was fractured.

Plaintiffs filed a complaint seeking damages on July 10, 2013, which included a per quod claim on behalf of Clifford Baum. An answer was filed thereafter. On or about August 29, 2014, defendant filed a motion for summary judgment. At the conclusion of oral argument on March 6, 2015, the judge granted

the motion in a comprehensive oral opinion. This appeal followed.

Plaintiff argues the judge "erred when [he] held that [p]laintiff needed an expert report to prove negligence" and that the "common knowledge" exception is applicable under these circumstances. We disagree and affirm substantially for the reasons set forth in the judge's opinion. We add only the following.

Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The court's inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)); see also Jolley v. Marquess, 393 N.J. Super. 255, 267 (App. Div. 2007). "At this stage of the proceedings, the competent evidential materials must be viewed in the light most favorable to plaintiff, the non-moving party, and [plaintiff] is entitled

to the benefit of all favorable inferences in support of [the] claim." Bagnana v. Wolfinger, 385 N.J. Super. 1, 8 (App. Div. 2006) (citing R. 4:46-2(c); Brill, supra, 142 N.J. at 540); see also In re Estate of Sasson, 387 N.J. Super. 459, 462-63 (App. Div.), certif. denied, 189 N.J. 103 (2006).

We apply the same standard as the trial court in reviewing the granting of a motion for summary judgment. Townsend v. Pierre, 221 N.J. 36, 59 (2015). If there is no factual dispute, and only a legal issue to resolve, the standard of review is de novo and the trial court rulings "are not entitled to any special deference." Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995).

The judge held, in pertinent part:

> It is undisputed that [plaintiff] was aware of the wheelchair in her vicinity when she stood up to walk into the exam room. It is undisputed that [plaintiff] tripped over the wheelchair. [Plaintiff] was well aware of where the wheelchair was, and did not avoid it when walking across the room. While plaintiffs attempt to assert negligence on the basis that the waiting room was overcrowded, plaintiff failed to cite any evidence that this condition was dangerous or [a product of] negligence. Plaintiff did not cite any municipal code or ordinance such as a fire code which states how many people would be a safe number for the size of the waiting room.
>
> Plaintiffs also do not cite to any statute or common law for the assertion that an overcrowded waiting room on its face is

> negligence. Further plaintiffs did not provide a single expert or report which supports their position that an overcrowded waiting room was negligence on the part of the defendant[s].
>
> Negligence again must be proven and will never be presumed. Indeed there is a presumption against it. . . .
>
> In the instant matter, the plaintiffs have failed to meet their burden by proving negligence. While a layperson may be able to say that the room was overcrowded and dangerous, that still . . . falls short of meeting any legal burden of proving negligence.

It is clear that a landowner must "use reasonable care to make the premises safe" for invitees. Olivo v. Owens-Illinois, Inc., 186 N.J. 394, 406 (2006) (quoting Handleman v. Cox, 39 N.J. 95, 111 (1963)). Although this duty of reasonable care is non-delegable, La Russa v. Four Points at Sheraton Hotel, 360 N.J. Super. 156, 162 (App. Div. 2003), a plaintiff bears the burden of proving the landowner did not follow the requisite standard of care, Feldman v. Lederle Labs., 132 N.J. 339, 349-50 (1993).

Determining the existence of a duty and the standard of care to be applied is a question of law to be determined by the court. Jerkins v. Anderson, 191 N.J. 285, 305 (2007) ("Although the existence of a duty is a question of law, whether the duty was breached is a question of fact."). In ordinary negligence

actions, "the plaintiff is not required to establish the applicable standard of care." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (citing Sanzari v. Rosenfeld, 34 N.J. 128, 134 (1961)). In those circumstances, "[i]t is sufficient for [the] plaintiff to show what the defendant did and what the circumstances were. The applicable standard of conduct is then supplied by the jury[,] which is competent to determine what precautions a reasonably prudent man in the position of the defendant would have taken." Id. at 406-07 (quoting Sanzari, supra, 34 N.J. at 134).

Situations do arise, however, where "expert testimony must be presented in specific kinds of cases to prove technical matters outside the scope of the average juror's knowledge and experience." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, comment 1 on N.J.R.E. 702 (2016). When the jury's common knowledge is insufficient to measure the defendant's conduct, the plaintiff must establish the standard of care governing the defendant's conduct and the deviation from that standard through expert testimony. Davis, supra, 219 N.J. at 407. Simply put, "expert testimony is [generally] required when 'a subject is so esoteric that jurors of common judgment and experience cannot form a valid conclusion.'" Ford Motor Credit Co., LLC v. Mendola, 427 N.J. Super. 226, 236 (App. Div. 2012)

(quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 450 (1993)).

"The doctrine of common knowledge is appropriately invoked where the 'carelessness of the defendant is readily apparent to anyone of average intelligence and ordinary experience.'" Estate of Chin v. Saint Barnabas Med. Ctr., 160 N.J. 454, 469-70 (1999) (quoting Rosenberg ex rel. Rosenberg v. Cahill, 99 N.J. 318, 325 (1985)). Although some cases "may generally require the proponent to offer expert testimony in support of its claims, that requirement may be diminished or dispensed with entirely when the proposition to be established . . . is sufficiently understandable as to be deemed within the typical knowledge and experience of the average juror." Biunno, Weissbard & Zegas, supra, comment 1 on N.J.R.E. 702.

The trial judge has discretion to determine the necessity for expert testimony "to enhance the knowledge and understanding of lay jurors" regarding the standard of care. State v. Griffin, 120 N.J. Super. 13, 20 (App. Div.), certif. denied, 62 N.J. 73 (1972). Only when the trial court commits a clear error of judgment does this court disturb the trial court's decision. State v. J.A.C., 210 N.J. 281, 295 (2012). Stated another way, "an appellate court should not substitute its own judgment for that of the trial court, unless 'the trial court's ruling was so

wide of the mark that a manifest denial of justice resulted.'" State v. Brown, 170 N.J. 138, 147 (2001) (quoting State v. Marrero, 148 N.J. 469, 484 (1997)).

Here, notwithstanding defendants' duty of care to maintain a safe waiting room, we discern no abuse of discretion in the judge's determination that expert testimony was required to establish whether the waiting room was unsafe and whether defendants breached their duty. Given the absence of applicable codes or regulations governing the waiting room's capacity, we conclude, as did the motion judge, that expert testimony was required. Whether the waiting room was unsafe would implicate an analysis involving spatial considerations and, predicated upon those considerations, the number of occupants that would render it "unsafe". That analysis is beyond the common knowledge of the average juror.

As plaintiffs did not procure an expert's opinion, they were unable to establish the standard of care which defendants allegedly breached by their acts or omissions. As such, the judge properly held that defendants were entitled to summary judgment in their favor.

Affirmed.