NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3341-14T1

STELA BOMTEMPO,

Plaintiff-Appellant,

v.

SIX FLAGS GREAT ADVENTURE LLC (improperly pleaded as "SIX FLAGS ENTERTAINMENT CORPORATION, SIX FLAGS THEME PARKS, INC., SIX FLAGS GREAT ADVENTURE INCORPORATED, SIX FLAGS HURRICANE HARBOR, NEW JERSEY"),

Defendant-Respondent.

Submitted September 6, 2016 – Decided September 12, 2016

Before Judges Hoffman and Currier.

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. L-1943-13.

Clark Law Firm, PC, attorneys for appellant (Gerald H. Clark, of counsel and on the brief; Mark W. Morris, on the brief).

Dwyer, Connell & Lisbona, attorneys for respondent (William T. Connell, on the brief).

PER CURIAM

Plaintiff Stela Bomtempo appeals a February 20, 2015 Law Division order granting defendant Six Flags Great Adventure

LLC's motion for summary judgment and dismissing plaintiff's personal injury action. On appeal, plaintiff contends that the trial court erred by rejecting her theories of common knowledge and res ipsa loquitur, and improperly declined to consider affidavits supplied after the close of discovery. We affirm.

We briefly summarize the relevant facts, as gleaned from the summary judgment record.[1] On May 29, 2011, plaintiff was injured at Hurricane Harbor, a water-based theme park owned and operated by defendant in Jackson Township. Plaintiff, along with her husband, cousin, and one of her friends, had decided to experience one of the park's new attractions, the "Tornado." Defendant's website provides a description of the ride:

> First you'll shoot from a height of 75 feet down a 132-foot tunnel. Right about now you're traveling at 35 feet per second. But hold on tight, because you are about to be shot into an unbelievably huge 60-foot-wide funnel, where you'll feel the full thundering power of the Tornado. You'll swirl through the funnel like you're being blown around with furious force.
>
> Your raft swishes up the impossibly high walls at full blast and you'll be powerless to do anything about it. So hang on while you slide wildly back and forth, until you're all shot out the bottom.

[1] In so doing, we grant all factual inferences in favor of plaintiff as the non-moving party. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Plaintiff and the rest of her group enjoyed the ride once without incident. However, when they went on the ride for a second time, plaintiff contends that, as their raft entered the funnel section of the Tornado, it ascended the first high point of the funnel and seemed to skim off the surface of the ride, before abruptly and violently slamming to the surface of the funnel. Plaintiff immediately began to experience severe pain in her back. When the ride concluded, plaintiff was taken to the hospital, where she was diagnosed with a compression fracture in her lower spine.

Plaintiff filed a complaint against defendant on May 24, 2013, alleging various forms of negligence including failure to "properly inspect and/or maintain the 'Premises,' amusement rides and all components thereof." Rather than submitting an expert report to support her allegations of negligence, plaintiff pursued theories of res ipsa loquitur and common knowledge. On February 2, 2015, after discovery had closed, plaintiff submitted two affidavits — one by plaintiff, and the other by her husband — asserting for the first time that upon finishing the ride, the raft they were using had deflated.

At the close of discovery, defendant filed a motion for summary judgment, which was heard by Judge Camille M. Kenny on February 20, 2015. After hearing arguments, Judge Kenny

declined to consider the post-discovery affidavits, and ultimately rejected plaintiff's negligence claims. Accordingly, Judge Kenny granted defendant's motion and dismissed the complaint. This appeal followed.

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." R. 4:46-2(c). When reviewing an order granting summary judgment, we "employ the same standard [of review] that governs the trial court." Henry v. New Jersey Dep't of Human Servs., 204 N.J. 320, 330 (2010) (quoting Busciglio v. DellaFave, 366 N.J. Super. 135, 139 (App. Div. 2004)). Absent any genuine factual disputes, we do not defer to the trial court and review legal conclusions de novo. Ibid. (citations omitted).

In negligence actions, plaintiffs are ordinarily not required to prove the applicable standard of care. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 407 (2014) (citation omitted). However, where common knowledge is insufficient to establish a defendant's duty, plaintiffs must produce expert testimony regarding the appropriate standard of care and the defendant's deviation from that standard. Ibid.; see also

Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 450 (1993) ("In general, expert testimony is required when 'a subject is so esoteric that jurors of common judgment and experience cannot form a valid conclusion.'" (quoting Wyatt ex rel. Caldwell v. Wyatt, 217 N.J. Super. 580, 591 (App. Div. 1987)).

Guided by these principles, the trial judge granted defendant's motion for summary judgment, holding that plaintiff lacked the necessary expert testimony to establish defendant's standard of care. On appeal, plaintiff presents the same argument she presented to the trial judge — that expert testimony was not required because a jury's common knowledge would be sufficient to ascertain the standard of care. We disagree, and affirm for substantially the reasons set forth by Judge Kenny in her cogent and well-reasoned opinion, read from the bench on February 20, 2015. We add the following comments.

Plaintiff's argument fails to consider relevant precedent. In Dare v. Freefall Adventures, we held that expert testimony was required to establish the applicable standard of care for a skydiving school in light of the specialized knowledge and conduct required to properly instruct and supervise skydivers. 349 N.J. Super. 205, 215–16 (App. Div.), certif. denied, 174 N.J. 43 (2002). Highlighting "the complexities and variables involved in applying pertinent skydiving guidelines," we

concluded that "expert testimony was necessary to establish what standard of care applied[.]" Ibid. (citations omitted).

Similarly, the record here reflects that operation and maintenance of the attraction at issue requires a thorough comprehension of the attraction's standard operating procedures, which were designed to comply with guidelines established by the American Society for Testing and Materials. These procedures require ride attendants to learn and understand an extensive body of particularized terminology regarding aquatic safety. Attendants are required to undergo five levels of training, culminating in the procurement of a certification to operate the ride. As intensive as this training may be, attendants are not tasked with the responsibility of performing maintenance on the ride. Only management performs those functions, presumably because maintenance requires additional training and knowledge beyond that of the ground-level attendants. With these circumstances in mind, we agree with the trial judge that expert testimony was required to establish the applicable standard of care.

Moreover, we agree with the trial court that plaintiff failed to establish a claim under the theory of res ipsa loquitur. The doctrine, which is Latin for "the thing speaks for itself," permits a jury to infer negligence in certain

circumstances. See Khan v. Singh, 200 N.J. 82, 91 (2009). To establish a cause of action under this theory, a plaintiff must demonstrate that "(a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality was within the defendant's exclusive control; and (c) there is no indication in the circumstances that the injury was the result of the plaintiff's own voluntary act or neglect." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 269 (1958). Although application of res ipsa effectively reduces the plaintiff's burden of persuasion, it does not shift the plaintiff's burden of proof. Eaton v. Eaton, 119 N.J. 628, 638 (1990).

Plaintiff argues that the occurrence in question here ordinarily bespeaks negligence. We disagree. Unlike the cases cited by plaintiff — such as Rose v. Port of N.Y. Auth., 61 N.J. 129 (1972), where a man was struck by an automatic door that clearly was not supposed to close while someone was walking through it — negligence in this case is not plainly evident. Here, plaintiff cannot point to any specific malfunction which caused her injuries. She attempts to argue that the ride malfunctioned when her group's raft was elevated off the ground and then slammed to the surface, but the record lacks any indication that this event plainly bespeaks negligence. The entire purpose of the attraction is to project riders back and

forth along the sides of the funnel. This function is forewarned on defendant's website, and thus was clearly and unambiguously advertised as a typical occurrence on the ride. The allegation that the raft "skim[med] off the surface of the ride," without any further evidence indicating that such an event is not supposed to occur, does not bespeak negligence.

We also reject plaintiff's argument that the trial court erred by refusing to consider affidavits produced following the close of discovery. As a matter of course, we will defer to a trial court's decisions on discovery matters absent an abuse of discretion, Wilson v. Amerada Hess Corp., 168 N.J. 236, 253 (2001), and we discern no such abuse here. The affidavits were generated after discovery had ended, in opposition to defendant's motion for summary judgment. They set forth new claims that had not been previously raised. We agree with the trial court that in addition to being untimely, these allegations were substantively insufficient to defeat summary judgment.

Affirmed.