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**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2557-20**

**BRIAN KOWALSKI,**

Plaintiff-Appellant

v.

**SOUTH JERSEY WATER  
TEST, LLC,**

Defendant-Respondent.

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Submitted March 23, 2022 – Decided April 22, 2022

Before Judges Hoffman, Whipple and Susswein.

On appeal from the Superior Court of New Jersey, Law  
Division, Burlington County, Docket No. L-1638-19.

Brian Kowalski, appellant pro se.

Reardon Anderson, LLC, attorneys for respondent  
(Thomas W. Carter, of counsel and on the brief).

**PER CURIAM**

Plaintiff Brian Kowalski appeals from a February 12, 2021 Law Division order granting the summary judgment dismissal of his claims against defendant South Jersey Water Test, LLC (SJWT or defendant). Plaintiff also appeals from an April 1, 2021 order denying reconsideration. For the reasons that follow, we affirm.

## I.

We begin with a summary of the relevant facts and procedural history. In 2014, plaintiff contracted to purchase a home on Kendles Run Road (the home) in Moorestown. Before completing the sale, plaintiff's realtor hired defendant<sup>1</sup> to inspect the home's septic system. Defendant performed the inspection in accordance with guidelines issued by the New Jersey Department of Environmental Protection (NJDEP) in July 2003, entitled Technical Guidance for Inspections of Onsite Wastewater Treatment and Disposal Systems (NJDEP Guidelines).

The NJDEP Guidelines provide, in relevant part:

[T]he following items should be addressed [in an inspection report], requested from the homeowners prior to inspection, and compared to the information gathered during the inspection:

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<sup>1</sup> The parties do not dispute plaintiff was a third-party beneficiary to the realtor-SJWT contract, giving plaintiff standing to enforce the contract.

. . .

3. Number of bedrooms.
4. If occupied, what is the current number of occupants? If vacant, how long? What is the expected number of occupants?

The NJDEP Guidelines identify twelve "factors" as

worthy of note when determining a satisfactory [septic] system. They should be included in the Inspection Report and brought to the client's attention.

. . . .

[The] [n]umber of bedrooms in the administrative authority approval that was the basis for the system design and approval is less than the number of bedrooms present. . . .

On April 8, 2014, Mark Riether, defendant's laboratory director, inspected the home's septic system, rating it "satisfactory with concerns." He prepared a report following the inspection, stating he "found the onsite wastewater treatment and disposal system to be satisfactory." Riether's report stated that the home, built in 1980, has five bedrooms, that two persons had been living there, and that three occupants were expected in the future; in addition, no site plan or septic map was available. The report further explained that,

[d]uring the inspection, the septic system was partially hydraulically loaded with approximately 150 gallons of

water and performed as expected. The septic tank was operating at the proper level and was equipped with inlet and outlet baffles. Additionally, no high[-]water levels were identified in the absorption area and there were no noticeable signs of previous unsatisfactory performance. However, there are some items about which we have comments or concerns.

First, the report noted the septic system's absorption area was "undersized based on today's standards." The report also remarked that "[s]ystems older than [twenty] years generally do not meet current standards, may be beyond their peak operating efficiency, yet function at the time of the inspection." The home's septic system was thirty-four years old when Riether inspected it.

The report also pointed out that "[a] lawn irrigation system is situated in the area of the [septic system]. Irrigation above system components could hydraulically overload the system and lead to premature malfunction."

Defendant's report further noted,

The water softener backwash currently discharges into the [septic system]. Current standards do not require a seepage pit or disposal system for this discharge, although redirecting this discharge to a separate area can reduce hydraulic loading to the main septic system and can extend the serviceable life of the septic system . . . . Therefore, it may be prudent to redirect this discharge into a separate area other than the septic system.

Defendant's report also alerted plaintiff that "[a]t the time of inspection, the concrete D[istribution]-box was partially deteriorated but still functioning as designed. The D[istribution]-box vessel may need repair or replacement in the near future." The report also recommended, "For ongoing maintenance, regular pumping is recommended at intervals of 2-3 years, on average, and is appropriate maintenance to keep most [septic tanks] in proper working condition."

While defendant found the home's "onsite wastewater treatment and disposal system to be in satisfactory condition on the date it was inspected," defendant's report also clearly stated that SJWT was not extending "a warrant[y] or guarantee as to the remaining serviceable life of the system, nor [was] the inspection conducted for Administrative Code compliance." Defendant's report also contained a detailed disclaimer.

Plaintiff, an attorney,<sup>2</sup> admitted he read defendant's report before closing on his purchase of the home in May 2014. Plaintiff did not attempt to determine the septic system's age, either before signing the sales contract or before completing his purchase of the home.

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<sup>2</sup> At oral argument, plaintiff stated that he "practiced in private practice doing transactional work in business."

Notwithstanding the issues raised in defendant's report, plaintiff never redirected the water treatment discharge or retained a contractor to do so. Nor did plaintiff ever address the impact of the lawn irrigation system upon the septic system. Plaintiff also did not address the septic system's partially-deteriorated Distribution-box. Nor did plaintiff have the septic system pumped during the five years he lived at the home.

According to plaintiff, he retained a contractor to inspect the septic system two years after purchasing the home. This contractor allegedly inspected the system and determined the system did not require pumping; however, plaintiff could not identify this contractor. Plaintiff stated he did not pay this contractor for the "visual inspection" of the septic system.

Riether testified he "did a lot to ensure that [SJWT] did a good inspection, a fair[,] objective inspection and we were not inclined to fail things like most companies, English [Sewage] (ES) as an example." Riether explained that SJWT sought to educate the homebuyer as to potential concerns with the system before completing the purchase. Riether explained that SJWT "tried to find reasons to pass a septic system and let people know through education" about concerning septic system components. According to Riether, other inspection companies "fail stuff so they can put a new [septic system] in."

Plaintiff sold the home in 2019. Defendant again performed a water test at the home before the sale. The buyer then retained ES to inspect the septic system before purchasing the home. ES issued a report, describing the system as "unsatisfactory." ES enumerated several reasons for its opinion, citing the system's age and "potentially non-compliant conditions."

Regarding system age, ES stated:

An OWTDS<sup>3</sup> is allowed for an existing use and still not meet current standards due to age, dimensions, number of bedrooms and modifications present at the time of inspection. (For example, pre-1990 designs, added bedrooms, a basement bathroom with pump or garbage disposal are the more common finding).

ES also listed numerous "[c]oncerns / reportable conditions that may impact future operability and/or safety," including that "[t]he installed system appears undersized in all respects based on current standards[.]" After receiving the ES report, plaintiff incurred more than \$25,000 in expenses to make the home's septic system suitable for sale.

Plaintiff filed this action in July 2019, asserting claims against defendant for negligent misrepresentation, fraudulent misrepresentation, negligence,

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<sup>3</sup> Onsite Wastewater Treatment and Disposal System.

breach of warranty, and breach of contract.<sup>4</sup> Following plaintiff's deposition in May 2020, defendant's attorney requested several documents that plaintiff referenced during his deposition, including a "binder" he may have received "from the previous homeowner," which contained a list of names for various homeownership services, including "a company that performed previous septic pumping" at the home. Plaintiff eventually responded he "does not possess a copy of the 'binder.'"

Even though the trial court extended the discovery end date and the deadline for submitting expert reports, plaintiff failed to produce an expert report before the deadline passed. Thereafter, defendant moved for summary judgment, which plaintiff opposed. Following oral argument, the motion court granted SJWT's motion for summary judgment, dismissing plaintiff's complaint. In dismissing plaintiff's breach of contract claim, the motion court found defendant performed the work under the contract, explicitly mentioning that systems older than twenty years generally do not meet current standards. The motion court considered this an explicit recognition of the undersized septic system in SJWT's 2014 report.

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<sup>4</sup> We address only plaintiff's breach of contract claim in this opinion. In plaintiff's brief, he conceded the motion court correctly dismissed the balance of his claims against defendant.



The motion court also found that plaintiff's breach of contract claim failed because he did not produce an expert report. The court explained that because plaintiff's breach of contract claim turns on defendant's alleged failure to perform its inspection in accordance with NJDEP Guidelines, and these requirements exceed the average juror's general knowledge, plaintiff's claim required the support of expert testimony. Because the deadline to produce expert reports had passed, the motion court entered summary judgment in favor of defendant.

On March 4, 2021, plaintiff moved for reconsideration, which defendant opposed. After hearing oral argument, the motion court denied reconsideration, finding no "palpably incorrect or irrational basis" for the original grant of summary judgment.

This appeal followed, with plaintiff challenging both the order granting summary judgment to defendant and the order denying reconsideration. Plaintiff raises the following arguments:

POINT I

THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT SUMMARY JUDGMENT AND DISMISSING THE BREACH OF CONTRACT COUNT.

A. THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THAT DEFENDANT BREACHED ITS CONTRACTUAL OBLIGATION TO ISSUE A REPORT ON THE SEPTIC SYSTEM IN ACCORDANCE WITH THE GUIDELINES BY OMITTING ANY MENTION IN THE REPORT THAT THE SEPTIC TANK WAS UNDERSIZED AND DID NOT MEET THE STANDARD OF 250 GALLONS OF CAPACITY PER BEDROOM AS PRESCRIBED BY LAW

B. THE TRIAL COURT ERRED IN HOLDING THAT EXPERT TESTIMONY WOULD BE REQUIRED, BECAUSE EXPERT TESTIMONY WOULD BE NECESSARY ONLY AS TO HOW DEFENDANT PERFORMED THE INSPECTION, AND THE BREACH OF CONTRACT CLAIM IS BASED ON THE REPORT AND NOT THE INSPECTION

C. THE TRIAL COURT ERRED IN HOLDING THAT EXPERT TESTIMONY WOULD BE REQUIRED TO ADMIT THE GUIDELINES AT TRIAL BECAUSE THE INSPECTION IS NOT WITHIN THE KEN OF THE AVERAGE JUROR; BUT THE GUIDELINES PROVIDE THAT AN INSPECTION REPORT SHOULD INFORM THE CLIENT ABOUT TANK SIZE, THE NUMBER OF BEDROOMS, AND THE RELATIONSHIP BETWEEN THOSE TWO FACTS; AND THE FAILURE TO REPORT THAT INFORMATION, KNOWN TO THE DEFENDANT, IS THE

BASIS FOR THE BREACH OF  
CONTRACT COUNT, AND THESE  
CONCEPTS ARE CLEARLY WITHIN  
THE KEN OF THE AVERAGE JUROR.

POINT II

THE TRIAL COURT ERRED IN DENYING  
PLAINTIFF'S MOTION FOR RECONSIDERATION  
ON THE BREACH OF CONTRACT COUNT.

II.

"We review de novo the trial court's grant of summary judgment, applying the same standard as the trial court." Abboud v. Nat'l Union Fire Ins., 450 N.J. Super. 400, 406 (App. Div. 2017) (citing Templo Fuente de Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016)). This standard mandates the grant of summary judgment "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).

"An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Ibid. The trial court should not

hesitate to grant summary judgment "when the evidence 'is so one-sided that one party must prevail as a matter of law.'" Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)).

#### Plaintiff's Failure to Produce an Expert Report

We first address whether plaintiff's breach of contract claim against defendant required him to produce an expert report. Plaintiff contends the average juror could understand the home's septic tank had a capacity of 1,000 gallons, and because the NJDEP regulations currently require 250 gallons of capacity per bedroom, N.J.A.C. 7:9A-8.3, the home's five bedrooms made it non-compliant with this regulation. Plaintiff argues the average juror could understand that the home has five bedrooms, leaving only 200 gallons of capacity per bedroom, and therefore plaintiff did not require an expert report to establish that defendant's report did not comply with the NJDEP Guidelines. We disagree.

"If scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." N.J.R.E. 702.

"[A] factfinder [may not] speculate without the assistance of expert testimony in an area where the average person could not be expected to have sufficient knowledge or experience." State v. Doriguzzi, 334 N.J. Super. 530, 538 (App. Div. 2000) (citing Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997)).

We reject plaintiff's argument that he did not need to produce an expert report. We agree with the motion court that expert testimony was necessary for plaintiff to establish a breach of the inspection contract. As the motion court explained in its oral opinion:

I don't have before me any information that indicates that the . . . defendant here did not attempt to identify the approximate tank capacities here. Again, this is something that would likely require expert testimony of exactly how that approximation is performed. . . . I don't know because I don't have that expertise [and] neither would a jury.

. . . .

I note that the performance standards require that the inspection be performed in a good and professional manner by the defendant in accordance with the applicable current [NJDEP Guidelines]. But again[,] we have no evidence that this inspection wasn't performed in a good and professional manner. Again, that would be something that would require expert testimony to specifically lay out information that's beyond the ken of the average juror of [how] defendant

would go about performing in a good and professional manner and how the defendant breached its obligation.

As the motion court noted, performing a septic tank inspection in a "good and professional manner" falls outside the expertise of the average juror. Moreover, plaintiff's breach of contract claims turns on whether SJWT performed its inspection in accordance with the NJDEP Guidelines. Whether defendant's inspection conformed with these guidelines also requires specialized knowledge. See N.J.R.E. 702. Accordingly, we conclude the motion court correctly determined that an expert report was required for plaintiff to sustain his breach of contract claim against defendant. Plaintiff's failure to do so is fatal to his claim, rendering summary judgment for defendant appropriate.

#### Whether SJWT Breached the Inspection Contract

We now turn to whether SJWT fulfilled its obligations under the contract. Plaintiff contends SJWT breached the inspection contract by failing to inform him that the septic tank was undersized. We disagree.

To sustain a breach of contract claim, a plaintiff must prove: (1) a valid contract between the parties; (2) the opposing party's failure to perform a defined obligation under the contract; and (3) a breach causing the claimant to sustain damages. Nelson v. Elizabeth Bd. of Educ., 466 N.J. Super. 325, 342 (App. Div.

2021) (citing EnviroFinance Grp., LLC v. Env't Barrier Co., 440 N.J. Super. 325, 345 (App. Div. 2015)).

We agree with the motion court that SJWT did not breach the inspection contract. As the motion court found:

[G]iven the very clear scope of the contract here, the work that was performed by the contract, the fact that the defendant here specifically says that systems older than 20 years generally do not meet current standards[,] [a]nd then as an example sets forth that it appears that the absorption area which consists of three disposal trenches would be considered undersized based on today's standards, where [they were] very clearly stating to [any party who] reads this that it doesn't appear that this is the size that's necessary by today's standards. I don't think there can be any question that [defendant] addressed this undersized system right in the heart of this report that was provided.

Indeed, defendant addressed the system's age and the likelihood that the system was non-compliant with current standards. Importantly, plaintiff admitted he read defendant's 2014 report revealing this information.

We also find significant, as did the motion court,

that the disclaimer is very clear. It's in a separate box. It clearly says disclaimer, and it clearly sets forth that . . . the inspection is based on the current condition of the system at the time of inspection. That the defendant makes no representation that the individual subsurface sewage disposal system inspection was designed, installed, or meets N.J.A.C. 7:9-11 et seq. [SJWT] has not been retained to warrant, guarantee, or certify the

proper functioning of the individual subsurface sewage disposal system for any period of time.

The record clearly supports the motion court's conclusion that

given . . . the very clear scope of the contract here, the work that was performed by the contract, the fact that the defendant here specifically says that systems older than [twenty] years generally do not meet current standards. And then as an example sets forth that it appears that the absorption area[,] which consists of three disposal trenches[,] would be considered undersized based on today's standards, where they're very clearly stating to . . . any party [who] reads this that it doesn't appear that this is . . . the size that's necessary by today's standards. I don't think there can be any question that . . . [SJWT] addressed this undersized system right in . . . in the heart of this report that was provided.

And so for those reasons, the [c]ourt cannot find that there was any breach.

We are satisfied the record demonstrates defendant performed its contractual obligations. The motion court properly granted summary judgment as the evidence was so one-sided that one party must prevail as a matter of law. See Brill, 142 N.J. at 540.

#### Plaintiff's Motion for Reconsideration

We review a court's denial of a motion for reconsideration for an abuse of discretion. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). A party



may seek reconsideration pursuant to Rule 4:49-2 if: 1) the court based its decision on "a palpably incorrect or irrational basis," 2) the court either failed to consider or "appreciate the significance of probative, competent evidence[,]" or 3) the moving party is presenting "new or additional information . . . which it could not have provided on the first application. . . ." Ibid.

We find no "palpably incorrect or irrational" basis upon which the motion court rested her decision. Ibid. There is no indication the motion court failed to appreciate probative, competent evidence, and plaintiff has presented no information he could not have presented on his motion for summary judgment. Ibid.

Far from being palpably incorrect or irrational, as we have already noted, the trial court's order granting summary judgement in defendant's favor was well-supported by the record and correct as a matter of law.

Any arguments not addressed lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION