(NOTE: The status of this decision is **Unpublished**.)

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

SUZANNA L. WILSON,

Plaintiff-Appellant,

v.

GEM AMBULANCE, L.L.C.,

Defendant-Respondent.

November 7, 2014

Argued October 15, 2014 –
Decided

Before Judges Messano, Ostrer
and Sumners.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-3564-11.

Samuel B. Fineman argued the cause for appellant (Cohen Fineman, L.L.C., attorneys; Mr. Fineman, on the brief).

Kim V. Mercado argued the cause for respondent (Peckar & Abramson, P.C., attorneys; Ms. Mercado, on the brief).

PER CURIAM

Plaintiff Suzanna Wilson was employed by defendant GEM Ambulance, LLC, from July to November 2010 as an emergency medical technician ("EMT"). Defendant investigated a complaint it received from Southern Ocean Center ("SOC"), a nursing home to which GEM provided transportation services, claiming that plaintiff had made false reports of elder abuse at its facility. After the investigation, defendant terminated plaintiff's employment, and she filed suit alleging defendant violated the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -8.

Following discovery, defendant moved for summary judgment. The judge concluded that plaintiff "did not perform a 'whistle-blowing' activity as described in N.J.S.A. 34:19-[3(a)]." He reasoned plaintiff's belief that "patients were being abused, even if reasonable, [was] of no consequence to her CEPA claim because the alleged conduct was being committed by an independent third party[,] and she did not report the abuse to her supervisors or a public body." The judge granted defendant summary judgment dismissing plaintiff's complaint.

Before us, plaintiff argues that the judge erred by concluding CEPA did not apply to her complaint about SOC because CEPA protects an employee who discloses certain policies or practices, not only of her employer, but also of "another employer, with whom there is a business relationship." N.J.S.A. 34:19-3(a). Plaintiff also contends that the judge misapplied proper summary judgment standards by concluding as a matter of law that she had never complained about SOC's conduct to her "supervisor." Lastly, plaintiff argues the judge abused his discretion by permitting defendant to submit, after the close of discovery, an "end of shift report" ("EOSR") prepared by defendant's dispatcher, which reflected the absence of any report by plaintiff regarding patient abuse at SOC.

We have considered these arguments in light of the record and applicable legal standards. We reverse and remand the matter to the Law Division for further proceedings.

I.

In reviewing summary judgment orders, "appellate courts 'employ the same standard [of review] that governs the trial court.'" W.J.A. v. D.A., 210 N.J. 229, 237 (2012) (alteration in original) (quoting Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010)). We first determine whether the moving party demonstrated there were no genuine disputes as to material facts. Atl. Mut. Ins. Co. v. Hillside Bottling Co. 387 N.J. Super. 224, 230 (App. Div.), certif. denied, 189 N.J. 104 (2006).

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge 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 v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

We limit our review to the record that existed before the motion judge. Ji v. Palmer, 333 N.J. Super. 463-64 (App. Div. 2000).

We then decide "whether the motion judge's application of the law was correct." Atl. Mut. Ins. Co., supra, 387 N.J. Super. at 231. In this regard, "[w]e review the law de novo and owe no deference to the trial court . . . if [it has] wrongly interpreted a statute." Zabilowicz v. Kelsey, 200 N.J. 507, 512 (2009).

Viewed in a light most favorable to plaintiff, Rule 4:46-2, the motion record reflects that on November 2, 2010, at approximately 6:43 p.m., plaintiff and her partner, EMT Golden, were dispatched to SOC. C.P., an elderly, non-ambulatory female resident, needed transportation to Southern Ocean Community Hospital ("the hospital").

Plaintiff testified in deposition that C.P. "had a goose egg lump in her hairline[,]" "bruising that came down and around behind her ear, in front of her ear, [and] down her neck[,]" and "bruising up her arm in multiple stages of healing . . . ." Plaintiff testified that "[w]hen we asked [SOC] where [the injuries] came from[,] nobody knew." A "Trip Details" report prepared by defendant's personnel who received the call from SOC and seen by its dispatcher, Michael Hynes, noted the injuries as "HEMATOMA ON HEAD, UNEXPLAINABLE BRUISES ON ARMS."

C.P.'s daughter, who was a doctor, rode to the hospital in the back of the ambulance with plaintiff and C.P. while Golden drove. Plaintiff testified that C.P.'s daughter expressed concern:

She asked me if I had ever
seen anything like this before and I

> just responded, "It wasn't the first time I had seen it." She asked me a different question that I don't remember in exact wording, but for every question she asked me I just told her it wasn't the first time I had seen it, but I didn't confirm or deny or how many other times or other patients or whatever.
>
> [At the hospital,] [t]he doctor came out. I gave my report to the doctor and . . . told [him] that I suspected abuse because [C.P. was] non-ambulatory . . . and . . . [SOC staff] had no idea where these injuries came from. . . .

Alaine O'Brien, defendant's Operations Manager and EMT supervisor, certified that SOC contacted defendant three days later, on November 5, 2010, claiming that plaintiff and Golden told C.P.'s daughter "they had transported patients from that facility many times before with unexplained bruising." O'Brien further stated that SOC asked defendant to "look into the matter and provide [SOC] with written statements from [plaintiff] and . . . Golden." Both O'Brien and defendant's principal, Jacob Halpern, certified that they had no knowledge of plaintiff's comments about SOC's practices until SOC contacted defendant.

O'Brien telephoned plaintiff and Golden regarding the incident and recorded her conversations with both. We have been provided with those recordings. Additionally, she asked Golden and plaintiff to provide written incident reports.

Golden submitted an email in lieu of an incident report. He stated that C.P.'s daughter "introduced herself as a doctor" and asked if they "had seen anything like this before from [SOC] and we answered her honestly that we had." Golden further stated:

> As state certified EMTS [sic] we are expected and required to report any and all types of suspected abuse to a higher medical or legal authority. . . . In closing please note that the decisions we made at the time were difficult ones. I realize we have a responsibility to the company and that this may hurt the relationship with the facility but I hope that GEM Ambulance is able to put human life above the all mighty [sic] dollar.

The incident report plaintiff prepared for O'Brien is dated November 6. In addition to describing her arrival at SOC to transport C.P., plaintiff described the patient's daughter's concern over her mother's unexplained bruises. Plaintiff wrote,

> We told her this isn't the first time we had seen this. She asked if we had seen it from this facility and we said yes. She asked if we had seen it from this floor [and] I said this isn't the first time I had seen it.

O'Brien certified that she had reviewed the four patient transports from SOC involving plaintiff during her employment with defendant. According to O'Brien, plaintiff never reported observing unexplained bruising on those patients.

On November 12, defendant terminated plaintiff and Golden. Plaintiff's written termination notice, signed by O'Brien, provided:

> [A]fter a thorough investigation of all calls and transports, it was concluded that there was never a similar incident in the past in which Gem Ambulance personnel responded to a[n] unexplained bruising at [SOC] and never has anyone reported either

> verbally or in writing anything to suggest that patients with unexplained bruising was a common occurrence at this facility.
>
> Therefore, . . . [plaintiff] submitted false and misleading information to the patient's family member and . . . presented an inaccurate negative depiction of [SOC]. In addition, [plaintiff] failed to notify management and the appropriate authority of her suspicions and concerns regarding this incident or any other prior incident[] she allegedly has witnessed on a regular basis at this facility. As a result . . . [plaintiff's] position is terminated effective immediately.

In opposing defendant's motion, plaintiff included her deposition testimony, in which she stated that she told her dispatcher on the night in question of C.P.'s injuries and her (plaintiff's) suspicion of abuse. Plaintiff also noted that one of her prior transport reports, in October 2010, specifically included the resident's claim that nursing staff had pushed her out of her bed. That report also demonstrated that plaintiff alerted the dispatcher, who emailed O'Brien with the information and noted it on the trip details report. Plaintiff also provided defendants' "Termination Log Summary," which described "Unsatisfactory Job Performance" as the reason for her termination.

In its reply, defendant included a certification from Hynes. He stated that he was not plaintiff's supervisor, and, as part of his dispatcher duties, he prepared an EOSR "to inform [the management team] of any issues that arose during [his] shift." The EOSR from November 2 was attached, and it made no mention of plaintiff's report of suspected abuse at SOC.

Plaintiff filed a motion to bar the EOSR. The judge entered an order that permitted plaintiff to depose Hynes and adjourned the summary judgment motion and pending trial. Hynes testified at his deposition that neither plaintiff nor Golden reported their concern over C.P.'s condition to him.

II.

A.

We immediately dispense with plaintiff's argument that the judge erred by permitting defendant to produce Hynes's EOSR report after discovery closed because defendant failed to comply with Rule 4:17-7.[1] We apply an abuse of discretion review standard to such claims. See Bender v. Adelson, 187 N.J. 411, 428 (2006) (applying abuse of discretion standard to discovery dispute regarding Rule 4:17-7) (citing Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div.), certif. denied, 185 N.J. 296 (2005)).

Plaintiff's claim that she told Hynes of her concerns meant that she knew he was a potential witness of some import. The judge gave plaintiff an opportunity to depose Hynes, which alleviated any claim of prejudice, and the EOSR only served to corroborate Hynes' testimony, which was that plaintiff and Golden never told him of their concerns. We find no mistaken exercise of the judge's broad discretion.

B.

Turning to the merits of plaintiff's appeal, the Court has recently explained, "CEPA is a remedial statute that promotes a strong public policy of the State and therefore should be construed liberally to effectuate its important social goal." Hitesman v. Bridgeway, Inc., 218 N.J. 8, 27 (2014) (quoting Battaglia v. United Parcel Serv., Inc., 214 N.J. 518, 555 (2013) (internal quotation marks omitted)). The statute provides:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer, or another employer, with whom there is a business relationship, that the employee reasonably believes:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including . . . in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care[.]

[N.J.S.A. 34:19-3(a)(1).]

A certified health care professional who asserts a CEPA claim under this section of the statute must prove four elements: 1) a reasonable belief that her "employer, or another employer, with whom there is a business relationship," provided an "improper quality of patient care"; 2) that she performed a whistle-blowing activity under provision (a); 3) that "an adverse employment action was taken against" her; and 4) that there is a "causal connection" between the whistle-blowing and the discharge or disciplinary act. Hitesman, supra, 218 N.J. at 29.

Initially, we note that the motion judge erred by dismissing plaintiff's complaint "because the alleged conduct," of which she complained, "was being committed by an independent third party," SOC, and not defendant. As the Court has said, in interpreting CEPA our "initial task is to analyze the statute's plain language." Id. at 26 (citing DiProspero v. Penn, 183 N.J. 477, 493 (2005)). The express language of CEPA prohibits "retaliatory action" if the employee "[d]iscloses . . . an activity, policy or practice of the employer, or another employer with whom there is a business relationship . . . ." N.J.S.A. 34:19-3(a) (emphasis added).

As originally enacted, CEPA only protected an employee who blew the whistle as to the conduct of her employer. See L. 1986, c. 105, § 3. However, in 1989, the Legislature extended protection to an employee who disclosed the conduct of "another employer, with whom there is a business relationship . . . ." See L. 1989, c. 220, § 2. The legislative purpose behind the amendment, as explained by the Assembly Labor Committee, was "to discourage collusion between employers for the purpose of inhibiting disclosure by their employees of violations of law committed by either employer." Assembly Labor Committee, Statement to A. 661 (May 23, 1988) (emphasis added). The Court construed the amendment in Barratt v. Cushman & Wakefield of N.J., 144 N.J. 120 (1996).

There, the plaintiff sued his employer, a commercial real estate broker, alleging retaliatory discharge under CEPA. Id. at 122. The defendant was the "exclusive leasing agent" for a partnership which owned a commercial building. Ibid. At some point, the plaintiff, or someone acting on his behalf, sent a letter to the New Jersey Real Estate Commission notifying it of alleged misconduct by one of the partnership's minority partners regarding an earlier real estate transaction in which both the plaintiff and the defendant were involved. Id. at 122-24.

The plaintiff's CEPA complaint was dismissed on summary judgment by the Law Division, and we reversed. Id. at 125-26. The Court affirmed, concluding "that the exclusive leasing agreement between [the defendant] and [the partnership] constitute[d] a 'business

relationship' between the two employers." Id. at 128-29. The Court observed that it could not conclude as a matter of law that the minority partner was "another employer" for CEPA purposes. Id. at 129. However, given the remedial nature of CEPA, proper application of summary judgment standards demonstrated there was sufficient evidence to withstand defendant's motion. Ibid. As the Court recognized, "a business relationship at the time of the disclosure can provide the incentive for the collusion that CEPA sought to discourage." Id. at 130.

Here, the record is scant as to the exact nature of the "business relationship" between defendant and SOC. Plaintiff alleges there was one, the limited documentation supports that assertion and defendant has not specifically denied the existence of such a relationship. Under the circumstances, it was error to dismiss plaintiff's complaint on summary judgment because SOC was not her direct employer.

C.

Lastly, defendant urged in the Law Division, as it has before us, that there is no evidence in the record establishing plaintiff had "blown the whistle" on SOC. The motion judge agreed, concluding that plaintiff "did not report the [alleged] abuse [of C.P.] to her supervisors or a public body."

CEPA requires that a plaintiff disclose or threaten to disclose improper activity "to a supervisor or to a public body . . . ." N.J.S.A. 34:19-3(a). It is undisputed that plaintiff made no disclosure to a public body. CEPA defines a "supervisor" as

> any individual with an employer's organization who has the authority to direct and control the work performance of the affected employee, who has authority to take corrective action regarding the violation of the law, rule or

> regulation of which the employee complains . . . .
>
> [N.J.S.A. 34:19-2(d).]

Defendant's argument that plaintiff made no complaint to a "supervisor" is two-fold.

First, it contends that even if plaintiff told her dispatcher about alleged misconduct by SOC's staff, Hynes was not plaintiff's supervisor. However, the Court has stated that the term "supervisor," "is broadly defined" for CEPA purposes. Fleming v. Corr. Healthcare Solutions, 164 N.J. 90, 97 (2000). A person need not meet all the definitional criteria to qualify as a "supervisor" under CEPA. Abbamont v. Piscataway Twp. Bd. of Educ., 269 N.J. Super. 11, 22 (App. Div. 1993), aff'd, 138 N.J. 405 (1994).

In this case, plaintiff claims to have alerted Hynes, the dispatcher on duty, of her suspicions of improper patient care at SOC. In his deposition, Hynes refuted the suggestion that he was plaintiff's supervisor. However, the record discloses that the duties defendant assigned to its dispatchers included the "scheduling, locating, dispatching and monitor[ing] [of] EMT crews," and "select[ing] appropriate course[s] of action for each call . . . ." O'Brien, who testified she was plaintiff's supervisor, nevertheless responded in an email in the record that EMTs are to "report to dispatch" if something occurred during one of their calls. One of the other trip reports demonstrates that plaintiff reported to her dispatcher a resident's claim that she had been pushed out of her bed by one of SOC's staff. There was certainly sufficient evidence in the motion record to support a conclusion that if she reported the incident to Hynes, plaintiff was following procedure and reporting to her "supervisor."

Defendant also argues that there is no evidence that plaintiff made any report to anyone employed by defendant. However, we are obliged to assess the evidence in a light most favorable to plaintiff, without concern as to whether her proofs are sufficient ultimately to prevail.

Applying that indulgent standard, the motion evidence included plaintiff's sworn deposition testimony in which she stated unequivocally that she told Hynes of her suspicions regarding C.P.'s condition. Her partner, Golden, while not directly corroborating that a report to dispatch was made, certainly corroborated plaintiff's account of their observations at SOC and their conversation with C.P.'s daughter. The fact that Hynes claims plaintiff made no such report to him, as reflected by its omission in his self-prepared EOSR, and that other reports do not include plaintiff's allegations only serve to define the dispute.

Hynes acknowledged in his deposition that the trip reports can be edited after the fact. Indeed, two versions of the "trip details report" regarding C.P. were submitted as attachments to O'Brien's certification. The report printed on November 5, 2010, listed "None" in those fields identifying the patient's primary and secondary complaint, as well as the "Primary Payor." The report printed on August 1, 2012, listed the primary patient complaint as "Shortness of Breath," with a secondary complaint of "CONTUSION-HEAD," and the payor field was completed. The record fails to disclose who filled in these fields and when. In short, when the entire record is considered, the evidence is not "'so one-sided that [defendant] must prevail as a matter of law.'" Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed.2d 202, 214 (1986)).

Lastly, although we need not address the point to reach our decision, we note that defendant asserts in its brief that plaintiff "cannot be a whistleblower as she did not inform [defendant] of anything that it did not already know prior to [plaintiff's] telephone conversation with Ms. O'Brien or submitting her written statement." At oral argument before us, defendant further explained that plaintiff's statements to O'Brien were insufficient as a matter of law because they

were made during defendant's investigation of SOC's complaint. Defendant cites no support for this contention.

The undisputed record cited by defendant demonstrates that on November 5, 2010, it knew plaintiff and Golden had told C.P.'s daughter that they had witnessed possible elder abuse at SOC on this and other occasions. Defendant became aware of plaintiff's allegations from SOC, an employer with which, for our purposes we can assume, defendant had a "business relationship." SOC requested that defendant investigate by taking statements from plaintiff and Golden. Defendant did just that and conducted an investigation during which plaintiff made her allegations of possible abuse at SOC directly to her titular supervisor, O'Brien. O'Brien completed her investigation and on November 12 terminated plaintiff.

Viewing this evidence most indulgently in plaintiff's favor and without comment on the ultimate merits of her case, we fail to see why it was insufficient to establish a prima facie case of a violation of CEPA.

Reversed.

1 Rule 4:17-7 permits amendments to interrogatory answers after the close of discovery, but only if the proponent "certifies . . . that the information . . . was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date." Plaintiff contends defense counsel's only explanation for why the EOSR was furnished so late was a representation she made during oral argument that she was unaware of the report's existence.
