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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2191-15T4

JOSEPH D. MILLS,

Plaintiff-Appellant,

v.

DR. RICHARD J. MILLS,  
DR. PHILIP H. TSAI,  
HOMEWELL SENIOR CARE,  
IVY FLORENZ, a/k/a  
IVY LORENZ,

Defendants-Respondents.

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Argued May 23, 2017 – Decided June 1, 2017

Before Judges Yannotti and Fasciale.

On appeal from Superior Court of New Jersey,  
Law Division, Bergen County, Docket No. L-  
5549-15.

Richard S. Mazawey argued the cause for  
appellant (Law Offices of Richard S. Mazawey,  
attorneys; Mr. Mazawey, on the brief)

Lewis M. Markowitz argued the cause for  
respondent Dr. Richard J. Mills (Gutterman,  
Markowitz & Klinger, LLP, attorneys; Mr.  
Markowitz, of counsel and on the brief; Lauren  
B. DiSarno, on the brief).

Michael J. Keating argued the cause for respondent Dr. Philip H. Tsai (Dughi, Hewit & Domalewski, attorneys; Mr. Keating; of counsel; Cyndee L. Allert, on the brief).

Ross V. Carpenter argued the cause for respondent Homewell Senior Care (Hardin Kundla McKeon & Poletto, P.A., attorneys; Paul Daly, of counsel and on the brief; Mr. Carpenter, on the brief).

PER CURIAM

Plaintiff Joseph D. Mills appeals from orders entered by the Law Division on: September 18, 2015, granting summary judgment to defendant Homewell Senior Care (Homewell); October 23, 2015, denying reconsideration of the September 18, 2015 order; December 4, 2015, granting summary judgment to defendant Dr. Richard J. Mills; December 18, 2015, dismissing the complaint as to defendant Dr. Philip H. Tsai; and February 8, 2016, amending and correcting the order entered on December 4, 2015. We affirm.

I.

On June 8, 2015, plaintiff filed a pro se complaint in the Law Division against Dr. Mills, Dr. Tsai, Homewell, and Homewell's employee Ivy Florenz (also known as Ivy Lorenz). Plaintiff asserted claims of negligent infliction of emotional distress against all defendants. The claims arise from the death of plaintiff's father, Joseph R. Mills (decedent).

According to the complaint, in January 2009, decedent was diagnosed with cancer. Thereafter, decedent and his wife came to reside with plaintiff at his home in New Jersey. In March 2009, decedent's wife died. Plaintiff alleged that while decedent was grieving over the loss of his wife, his brother, Dr. Mills, "seized this opportunity to gain control over [his father's] affairs." Plaintiff further alleged that Dr. Mills, a neurologist, subjected decedent to negligent treatment, which contributed to his weakened immune system.

Plaintiff alleged that Dr. Mills manipulated the staff at certain medical facilities where decedent was treated. He claimed that Dr. Mills tortured and verbally abused decedent; acted to keep him in a care facility when he wanted to leave; manipulated a cardiologist and forced decedent to undergo defibrillator surgery; and led decedent to believe he was suffering from a "rare and horrible" neurological disorder and would die a "prolonged horrible death."

Plaintiff further alleged that decedent stopped eating and started removing his oxygen mask from his face. He claimed that decedent was suicidal in the hospital where he was being treated, and Dr. Tsai was negligent in releasing him to return home under home hospice care. Plaintiff claimed that decedent should have been placed in a psychiatric ward.

According to plaintiff, Homewell, the home hospice care provider, hired Ms. Florenz to act as a live-in nurse for decedent. Plaintiff alleged that two nurses were required to watch decedent continuously. He claimed that on May 24, 2009, Ms. Florenz fell asleep, "allowing" decedent to commit suicide by removing his oxygen mask.

Plaintiff alleged that as a result to these and other actions, he is "tormented by extremely stressful thoughts." He asserted that he is plagued, day and night, with traumatic and horrible memories, including Dr. Mills' "cruelty[,] manipulation, and virulent abuse treatment" of his father. He asserts that he was powerless to protect his father from Dr. Mills. He claims that he is afraid of Dr. Mills, and is "emotionally scarred for life" as a result of the behavior he was forced to witness.

On August 14, 2015, Homewell filed a motion for summary judgment seeking dismissal of all claims and cross-claims asserted against it.<sup>1</sup> Plaintiff opposed the motion. The Law Division judge entered an order dated September 18, 2015, granting Homewell's motion and dismissing the claims against it. In an accompanying opinion, the judge found that plaintiff's claims against Homewell

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<sup>1</sup> The record does not disclose whether Florenz was ever served with the complaint. Homewell's motion only sought summary judgment on the claims asserted against it.

were barred by the applicable statutes of limitations. The judge also found that plaintiff's claim of negligent infliction of emotional distress failed as a matter of law because plaintiff did not personally observe his father's death.

On September 30, 2015, plaintiff filed a motion for reconsideration of the September 18, 2015 order. The court entered an order dated October 23, 2015, denying the motion. In a rider to the order, the judge stated that plaintiff had not shown any basis for reconsideration. Plaintiff then filed a motion on short notice to rescind the October 23, 2015 order, and to vacate the September 18, 2015 order.

On November 5, 2015, Dr. Mills filed a motion for summary judgment, seeking the dismissal of all claims and cross-claims against him. Dr. Mills argued that the claims against him were time-barred. Plaintiff opposed the motion.

On November 25, 2015, Dr. Tsai filed a motion to dismiss the claims against him because plaintiff had not complied with the Affidavit of Merit Statute (AMS), N.J.S.A. 2A:53A-27. Plaintiff filed a cross-motion, which sought the denial of Dr. Tsai's motion but no affirmative relief.

The judge entered an order dated December 4, 2014, granting Dr. Mills' motion. In the written opinion filed with the order, the judge stated that plaintiff's claim was barred by the statute

of limitations for negligence actions, N.J.S.A. 2A:14-2(a). The judge determined that the discovery rule did not apply, and the doctrine of substantial compliance was not applicable. In addition, the judge found that the statute of limitations should not be tolled on equitable grounds.

On December 4, 2015, the judge also entered an order on plaintiff's request to rescind the October 23, 2015 order and vacate the September 18, 2015 order. In the rider appended to the order, the judge stated that plaintiff had not provided any basis to rescind or vacate the orders. The order dated December 4, 2015, erroneously stated, however, that the orders had been rescinded.

On December 18, 2015, the judge entered an order granting Dr. Tsai's motion to dismiss. In his written opinion, the judge stated that plaintiff had asserted a claim of professional negligence against Dr. Tsai. Therefore, the AMS applied to the claim. Because plaintiff had not filed an affidavit of merit as required by the AMS, the judge dismissed the claim against Dr. Tsai.

On February 8, 2016, the judge entered an order amending the December 4, 2015 order on plaintiff's motion to rescind the October 23, 2015 order and to vacate the September 18, 2015 order. The amended order stated that plaintiff's motion was denied "in its entirety." Plaintiff's appeal followed.

On appeal, plaintiff raises the following argument:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED APPELLANT THE OPPORTUNITY [FOR] A LOPEZ HEARING UNDER LOPEZ V. SWYER, 62 N.J. 267 (1973) TO DETERMINE WHETHER THE DISCOVERY RULE SHOULD HAVE APPLIED TO THE PLAINTIFF-APPELLANT'S NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS CLAIM.

II.

We note initially that the motion judge did not dismiss plaintiff's claim against Dr. Tsai on the basis of the statute of limitations. As we have explained, the judge determined that plaintiff had asserted a claim of professional negligence against Dr. Tsai, which was subject to the AMS. N.J.S.A. 2A:53A-27.

Therefore, the AMS required plaintiff to file an affidavit of merit from "an appropriate licensed person" stating that "there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices." Ibid.

The record shows that Dr. Tsai is a board-certified specialist in oncology, and Dr. Tsai was the attending oncologist for decedent's treatment after his admission to the hospital. In his complaint, plaintiff alleged that Dr. Tsai had wrongfully discharged decedent from the hospital and allowed him to return home, despite his knowledge of decedent's suicidal tendencies and his history of removing his oxygen mask.

Plaintiff claims that fourteen hours after Dr. Tsai discharged decedent from the hospital, decedent took his own life by removing his oxygen mask. He also alleges that Dr. Tsai knew that decedent had refused to take his oral anti-depressant medication, but failed to prescribe an intravenous substitute.

However, on appeal, plaintiff does not argue that the trial court erred by granting Dr. Tsai's motion to dismiss for plaintiff's failure to serve an affidavit of merit. It is well established that issues not briefed on appeal are deemed waived. Gormley v. Wood-El, 218 N.J. 72, 95 n.8 (2014); Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011).

Therefore, we affirm the trial court's order dismissing the claims against Dr. Tsai.

### III.

We next consider plaintiff's argument that the trial court erred by granting summary judgment in favor of Homewell and Dr. Mills. As noted, plaintiff contends the court should have conducted a Lopez hearing to determine when his causes of action against Homewell and Dr. Mills accrued.

An appellate court reviews an order granting a motion for summary judgment "in accordance with the same standard" that applies to the trial court's decision on the motion. Globe Motor Co. v. Iqdalev, 225 N.J. 469, 479 (2016) (quoting Bhagat v. Bhagat,



217 N.J. 22, 38 (2014)). That standard requires the trial court to grant 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 as a matter of law." R. 4:46-2(c).

The court "should first decide whether there was a genuine issue of material fact, and if none exists, then decide whether the trial court's ruling on the law was correct." Henry v. N.J. Dept. of Human Servs., 204 N.J. 320, 330 (2010). In doing so, the court "must view the evidence in the light most favorable to the non-moving party and analyze whether the moving party was entitled to judgment as a matter of law." W.J.A. v. D.A., 210 N.J. 229, 238 (2012).

Here, plaintiff argues that the discovery rule applies to his claims against Homewell and Dr. Mills for negligent infliction of emotional distress. He alleges the negligent acts of these defendants led to the untimely death of his father on May 24, 2009, which he claims to have witnessed. Plaintiff alleges he suffered a complete mental and emotional breakdown due to his discovery of newly-obtained information and records related to his father's death.

Plaintiff further alleges that in May 2015, he discovered "for the first time" that his father was "the victim" of defendants' negligence. Plaintiff asserts that although he knew he suffered an injury in May 2009, when he allegedly witnessed his father's death, he claims he did not know that the injury was attributable to the fault of defendants.

As the motion judge recognized, a claim for negligent infliction of emotional distress must be filed within two years after the cause of action "shall have accrued." N.J.S.A. 2A:14-2(a). The "discovery rule" is an equitable principle that serves to ameliorate the harsh results that can sometimes flow from the mechanical application of a statute of limitations. Henry, supra, 204 N.J. at 333.

The discovery rule tolls the running of the statutory limitations by "postponing the accrual of a cause of action until the plaintiff 'learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action.'" Vispiziano v. Ashland Chem. Co., 107 N.J. 416, 426 (1987) (emphasis omitted) (quoting Burd v. N.J. Tel. Co., 76 N.J. 284, 291 (1978)). The rule applies when an individual, by the exercise of reasonable diligence, should have discovered that he or she has a basis for an actionable claim. Staub v. Eastman Kodak Co., 320

N.J. Super. 34, 42-43 (App. Div. 1999) (citing Vispisisano, supra, 107 N.J. at 419)).

Discovering that one might have a basis for an actionable claim means perceiving an injury and believing, or having reason to believe -- with a degree of firmness that would lead a reasonable person to investigate the matter if he is interested in seeking redress -- that his injury was probably caused by the fault of another.

[Id. at 45.]

In this case, the motion judge determined that plaintiff's cause of action accrued on May 24, 2009, when decedent allegedly committed suicide as a result of the negligent actions of Dr. Mills and Homewell. The judge noted that plaintiff alleged that he began to suffer emotional distress in 2009, but claimed he did not fully appreciate the effect of his father's death until several years later, when he allegedly suffered a breakdown after reviewing medical records and documents that detailed the alleged negligent acts of Dr. Mills, Homewell, and others.

The judge concluded, however, that plaintiff knew or should have known of defendants' alleged negligent conduct at or about the time his father died. The judge noted that while plaintiff did not then have all of the medical records and documents related to his father's care, plaintiff "had knowledge of and witnessed many acts that formed the basis of a potentially actionable claim."

The record supports the motion judge's ruling. The evidence before the court on the summary judgment motions shows that plaintiff personally viewed some of the alleged wrongful acts of Homewell and Dr. Mills. He believed that his father's death on May 24, 2009, was in part due to these negligent acts. Plaintiff asserted that after he allegedly witnessed his father's death, he began to experience emotional distress.

Thus, the record shows that plaintiff's cause of action for negligent infliction of emotional distress accrued on May 24, 2009, when he allegedly witnessed his father's death and began to experience emotional distress. At that time, plaintiff knew he had sustained an injury. Plaintiff also knew or should have known at that time that he had an actionable claim against Homewell and Dr. Mills. The motion judge correctly determined that, in light of the facts as alleged, the discovery rule did not apply to plaintiff's claims.

The judge also correctly determined that the substantial compliance doctrine was inapplicable because plaintiff failed to take any action to assert his claims in the period required for the filing of his claims. See Galik v. Clara Maass Med. Ctr., 167 N.J. 341, 353 (2001) (noting that the substantial compliance doctrine requires, among other things, a series of steps taken to comply with the applicable statute (citing Bernstein v. Bd. of

Trs. of the Teachers' Pension and Annuity Fund, 151 N.J. Super. 71, 76 (App. Div. 1977)).

In addition, the judge correctly found that the equitable tolling doctrine was not applicable. Equitable tolling may be applied when the plaintiff is not able to identify an alleged tortfeasor during the limitations period. See Bernoskie v. Zarinsky, 344 N.J. Super. 160, 167-68 (App. Div. 2001) (holding that equitable tolling was warranted where the plaintiff was prevented from filing an action against persons who killed her husband because they escaped detection and apprehension for forty years).

Here, plaintiff knew or should have known of defendants' alleged wrongful conduct in 2009. Moreover, plaintiff allegedly witnessed his father's death in May 2009 and allegedly began to experience emotional distress at that time. Plaintiff did not, however, file his complaint until 2015. Under these circumstances, the equities do not favor tolling the statute of limitations.

We note that, in responding to plaintiff's arguments, Dr. Mills argues that the trial court's order granting summary judgment in his favor also should be affirmed because the trial court correctly found that plaintiff did not present sufficient evidence to support a claim for negligent infliction of emotional distress.

Under Portee v. Jaffee, 84 N.J. 88, 101 (1980), a plaintiff asserting such a claim must show

(1) the death or serious physical injury of another caused by defendant's negligence; (2) a marital or intimate, familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress.

Here, the motion judge determined that plaintiff's claim failed because plaintiff did not personally observe his father's suicide. According to the judge, the home-health aide advised plaintiff of his father's death after his father had already died. Dr. Mills argues that, even if plaintiff observed his father's death as he claims, his cause of action fails because he alleges he did not suffer severe emotional distress until 2015, when he reviewed the his father's medical records.

Because we conclude that the trial court correctly determined that plaintiff's claim against Dr. Mills was not filed within the time required by the applicable statute of limitations, we need not consider this alternative ground for affirming the trial court's order.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION