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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-4175-15T4

ROSEMARY STANLEY, on behalf  
of herself and all others  
similarly situated,

Plaintiff-Appellant,

v.

CAPRI TRAINING CENTER, INC.,  
d/b/a CAPRI INSTITUTE,

Defendant-Respondent.

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Submitted May 2, 2017 – Decided September 12, 2017

Before Judges Ostrer, Leone and Vernoia.

On appeal from the Superior Court of New  
Jersey, Law Division, Essex County, Docket No.  
L-182-16.

DeNittis Osefchen, PC, attorneys for appellant  
(Stephen P. DeNittis and Joseph A. Osefchen,  
on the briefs).

Bielan, Miklos & Makrogiannis, PC, attorneys  
for respondent (Judith Q. Bielan and Robert  
H. Benacchio, on the brief).

Gibbons P.C., attorneys for amicus curiae  
Association of Cosmetology and Hairstyling  
Schools of New Jersey, Inc., and Robert Fiance  
Beauty Schools, Inc. (Michael R. McDonald and  
Jennifer Marino Thibodaux, on the brief).

PER CURIAM

Plaintiff Rosemary Stanley appeals from an order dismissing her putative class action complaint with prejudice for failure to state a claim upon which relief can be granted. R. 4:6-2(e). Based on our review of the record in light of the applicable law, we reverse and remand for further proceedings.

I.

In our review of an order dismissing a complaint pursuant to Rule 4:6-2(e), we limit our summary of the facts to those alleged in the complaint, which we accept as true extending all favorable inferences to plaintiff. See Tisby v. Camden Cty. Corr. Facility, 448 N.J. Super. 241, 247 (App. Div.), certif. denied, \_\_\_ N.J. \_\_\_ (2017). Defendant operates four cosmetology schools in New Jersey. Each school has a clinic that provides cosmetology services to the general public in exchange for a fee paid to defendant. The services are "primarily and/or exclusively" provided by defendant's unlicensed cosmetology students. In 2011 and 2012, plaintiff visited one of defendant's clinics where she received and paid defendant for various cosmetology services.

Plaintiff alleges that the fees she and other putative class members paid defendant for cosmetology services exceeded those permitted under the Cosmetology and Hairstyling Act of 1984 (the Act), N.J.S.A. 45:5B-1 to -38. More particularly, she alleges

N.J.S.A. 45:5B-3(h) bars a cosmetology school clinic from charging the general public fees that exceed the amount required to "recoup . . . the costs of the materials used in the performance of [the] services."<sup>1</sup> Plaintiff alleges defendant charged her and the putative class members fees that exceeded the costs of the materials used to provide the cosmetology services they received.

Based on those facts, plaintiff's complaint alleges four causes of action: violation of the Consumer Fraud Act (CFA), N.J.S.A. 56:8-1 to -20 (count one); violation of the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA), N.J.S.A. 56:12-14 to -18 (count two); breach of the covenant of good faith and fair dealing (count three); and unjust enrichment (count four).

Defendant moved to dismiss the complaint for failure to state a claim upon which relief can be granted, R. 4:6-2(e), and requested oral argument, R. 1:6-2(d). It appears<sup>2</sup> defendant argued in its papers that plaintiff's claims turned on an interpretation

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<sup>1</sup> N.J.S.A. 45:5B-3(h) provides the Act's definition of "clinic": "a designated portion of a licensed school in which members of the general public may receive cosmetology and hairstyling services from registered students in exchange for a fee which shall be calculated to recoup only the cost of materials used in the performance of those services." (emphasis added).

<sup>2</sup> We do not have the benefit of the briefs filed before the motion court and, because the court did not hear the requested oral argument or make detailed findings or legal conclusions, we are unable to definitively identify the parties' arguments presented to the motion court.

of what constitutes the "cost of materials" under N.J.S.A. 45:5B-3(h), and therefore the New Jersey Board of Cosmetology and Hairstyling (the Board) had exclusive jurisdiction over the claims.

The court did not hear oral argument, but issued an order granting the dismissal motion. The order was untethered to any findings or conclusions of law, see R. 1:7-4, other than a notation on the order stating "[p]er N.J.S.A. 56:8-140 [and N.J.A.C.] 13:28-6.1[, ] the State Board has jurisdiction and there is no private cause of action."

Plaintiff appealed the order dismissing the complaint. We granted the Association of Cosmetology and Hairstyling Schools of New Jersey, Inc. (Association) and the Robert Fiance Beauty Schools, Inc. leave to appear as amicus curiae.

## II.

We review de novo an order dismissing a complaint under Rule 4:6-2(e). See Stop & Shop Supermarket Co. v. Cty. of Bergen, 450 N.J. Super. 286, 290 (App. Div. 2017). "[O]ur inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). A plaintiff is "entitled to every reasonable inference of fact," and "[t]he essential test is simply 'whether a cause of action is "suggested" by the facts,'" and

Green v. Morgan Props., 215 N.J. 431, 451-52 (2013) (quoting Printing Mart, supra, 116 N.J. at 746). Nonetheless, "[a] pleading should be dismissed if it states no basis for relief and discovery would not provide one." Rezem Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div.), certif. denied, 208 N.J. 368 (2011).

The standard "requires an assumption that the allegations of the pleading are true and affords the pleader all reasonable factual inferences." Seidenberg v. Summit Bank, 348 N.J. Super. 243, 249-50 (App. Div. 2002). The court must search the pleading "in depth and with liberality to determine whether a cause of action can be gleaned even from an obscure statement." Ibid.

To avoid a dismissal for failure to state a claim, a plaintiff is not required "to prove the case but only to make allegations, which, if proven, would constitute a valid cause of action." Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div.) (quoting Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001)), certif. denied, 185 N.J. 297 (2005). "However, a court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Ibid.

Here, the dismissal of the complaint was based on the court's determination that the Board had exclusive jurisdiction over plaintiff's claims and plaintiff therefore could not assert a

private cause of action for the alleged violation of N.J.S.A. 45:5B-3(h), and that plaintiff's claims were barred under N.J.S.A. 56:8-140 and N.J.A.C. 13:28-6.1.<sup>3</sup> Defendant urges that the court's dismissal of the complaint on those grounds was proper, and also because the Board had primary jurisdiction to address alleged violations of N.J.S.A. 45:5B-3(h) which support each of plaintiff's causes of action. Plaintiff argues the court erred. We address the bases upon which the court relied to support its dismissal order.

A. Exclusive Jurisdiction

Plaintiff argues the trial court erred to the extent it determined the Board has exclusive jurisdiction over plaintiff's claims. Plaintiff argues the Act does not contain an express grant

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<sup>3</sup> We are mindful that we determine the validity of a trial court's order and not its reasoning, Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001), but a motion court is required to find facts and state its conclusions of law in accordance with Rule 1:7-4. "Failure to make explicit findings and clear statements of reasoning [impedes meaningful appellate review and] 'constitutes a disservice to the litigants, the attorneys and the appellate court.'" Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Curtis v. Finneran, 83 N.J. 563, 569-70 (1980)). Our de novo standard of review of Rule 4:6-2(e) dismissal orders does not render Rule 1:7-4 a nullity, does not excuse a motion court's failure to make the required conclusions of law, and is not intended to be a means by which parties learn from the first time the reasoning behind the entry of an order. The parties are entitled to the motion court's reasoning prior to deciding whether to appeal, and this court is entitled to the record required under the rules, including Rule 1:7-4, to facilitate proper appellate review.

of exclusive authority to the Board and therefore the court has jurisdiction over the asserted causes of action. Defendant argues the trial court did not hold that the Board has exclusive jurisdiction, but that in any event N.J.S.A. 45:5B-2(a) grants the Board exclusive jurisdiction to enforce the Act.

Where the "Legislature has vested exclusive jurisdiction with an agency," a trial court is preempted of original jurisdiction over the subject matter. Smerling v. Harrah's Entm't, Inc., 389 N.J. Super. 181, 187 (App. Div. 2006). "The Legislature 'may vest an administrative agency with exclusive primary jurisdiction over common-law claims,' but only if it does so expressly, and by 'explicitly' granting that agency the power to 'award damages in private matters.'" Ibid. (quoting Campione v. Adamar of N.J., 155 N.J. 245, 260-62 (1998)). "As a general rule, jurisdiction of an administrative agency may be said to be exclusive when the remedy which the agency is empowered to grant is the only available remedy for the given situation." Ibid. (quoting In re Hoboken Teachers' Ass'n, 147 N.J. Super. 240, 248 (App. Div. 1977)).

The purpose of the Act was to establish a board to "administer, coordinate and enforce" the Act, and to promulgate regulations "relating to the practices of cosmetology," and "the premises at which those services are rendered and the schools at which instruction in those practices may be obtained." N.J.S.A.

45:5B-2(a). The Legislature created the Board, N.J.S.A. 45:5B-4, authorized the Board to promulgate regulations, N.J.S.A. 45:5B-6(r), (s),<sup>4</sup> and granted the Board authority to enforce the Act, N.J.S.A. 45:5B-2(a).

Under the Uniform Enforcement Act, N.J.S.A. 45:1-14 to -27, the Board also has authority to revoke, suspend, or refuse to renew the license of a licensee, such as defendant here, that violates the Act. N.J.S.A. 45:1-22. Among other sanctions, the Board may also impose civil penalties, or order a licensee to cease and desist from any violations of the Act. N.J.S.A. 45:1-22(b), (c). Of particular significance here, the Board has the authority to direct that a licensee "restore to any person aggrieved by an unlawful act or practice, any moneys or property . . . acquired by means of such act or practice; provided, however, [that the Board] shall [not] order restoration in a dollar amount greater than those moneys received by a licensee or his agent . . . violating" the Act or corresponding regulations. N.J.S.A. 45:1-22(d).

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<sup>4</sup> The Board adopted regulations to effectuate the Act. See N.J.A.C. 13:28-1.1 to -6.36. Of particular relevance, the Board adopted N.J.A.C. 13:28-6.27, which sets forth standards under which cosmetology students may provide services to the public but does not address the fees that may be charged under N.J.S.A. 45:5B-3(h).



Although one purpose of the Act is to protect "persons of the general public who are direct recipients of the services regulated by [the] [A]ct . . . from . . . fraudulent and deceptive practices," N.J.S.A. 45:5B-2(b), the Act and the UEA are devoid of any express or explicit grant of exclusive authority to the Board over common law or statutory claims for damages in private matters. See Smerling, supra, 389 N.J. Super. at 187. Our courts have uniformly rejected claims that administrative agencies have exclusive jurisdiction over common law and statutory causes of action where there is no express statutory grant of such jurisdiction to the agency. For example, in Boldt v. Correspondence Mgmt., Inc., 320 N.J. Super. 74, 77-78 (App. Div. 1999), plaintiffs filed a class action alleging in part that a defendant medical facility violated the CFA by overcharging for copies of medical records. The copying fees were regulated by the New Jersey Department of Health. Id. at 77. The defendants argued the Department of Health had exclusive jurisdiction to hear the plaintiffs' claims under N.J.A.C. 8:43G-15.3(d), which allowed the Department to sanction those entities that violated the limitation on fees for medical record photocopies. Id. at 81, 87.

We rejected the defendants' argument that the Department had exclusive jurisdiction to issue sanctions for regulatory violations because the plaintiffs sought "a remedy not available

. . . at the agency level," and not expressed in the legislative intent of the agency's governing statute. Id. at 87; see also New Jersey Div., Horsemen's Benevolent Protective Ass'n v. New Jersey Racing Comm'n, 251 N.J. Super. 589, 602-05 (App. Div. 1991) (finding the Racing Commission lacked exclusive jurisdiction over common law claim for misappropriation of charitable trust funds, in part because the governing statute was "altogether silent" as to the available remedies and forum, and also because matters of trust enforcement were within the recognized expertise of the Chancery Division).

Even where an agency's governing statute expressly provides that an agency has exclusive jurisdiction over certain matters, our courts have carefully limited the scope of the agency's exclusive jurisdiction and permitted the prosecution of claims of common law and statutory claims in court. In Campione, supra, 155 N.J. at 248-49, the plaintiff brought a common-law cause of action for discrimination, arguing a casino discriminated against him for counting cards. Under the Casino Control Act (CCA), N.J.S.A. 5:12-1 to -233, the Legislature established the Casino Control Commission (CCC or Commission), and vested it with quasi-legislative and quasi-judicial power over casino regulations. Thus, the CCC could promulgate regulations and adjudicate alleged

regulatory violations. Id. at 256-57; N.J.S.A. 5:12-63(1)(a), (b), (c).

The Campione Court noted that the CCA expressly granted the Commission "exclusive jurisdiction over all matters delegated to it or within the scope of its powers under the provisions of this Act." Id. at 260 (quoting N.J.S.A. 5:12-133(b)); see also N.J.A.C. 19:40-1.5(b). However, the Court observed that the statute did not expressly "delegate to the CCC the adjudication of a patron's common-law claims." Ibid. The Court noted that where the Legislature intends to authorize an agency to award damages in private manners, it must state so explicitly. Id. at 262 (comparing the CCC's statute with the Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, which allows LAD claims to be brought in Superior Court or the Division of Civil Rights, N.J.S.A. 10:5-13, and authorizes the Division of Civil Rights to award damages, N.J.S.A. 10:5-17).

Here, the Act and the UEA do not include any express grant of exclusive authority to the Board over plaintiff's statutory and common law claims. Under the principles in Campione, Boldt, and Smerling, we are therefore constrained to reverse the court's order based on its apparent determination that the Board has

exclusive jurisdiction over plaintiff's statutory and common law claims.<sup>5</sup>

### B. Primary Jurisdiction

Plaintiff also argues the court erred to the extent it dismissed the complaint based on a determination that the Board has primary jurisdiction to interpret the meaning of the term "cost of materials" under N.J.S.A. 45:5B-3(h).

"Primary jurisdiction is defined as the circumstance in which a 'court declines original jurisdiction and refers to the appropriate body those issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.'" Muise v. GPU, Inc., 332 N.J. Super. 140, 158 (App. Div. 2000) (quoting Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 269 n.1 (1978)); accord Estate of Kotsovska ex rel. Kotsovska v. Liebman, 221 N.J. 568, 588 (2015). One purpose of the doctrine of primary jurisdiction "is to allow an agency to apply its expertise

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<sup>5</sup> We reject the contention that the Board has exclusive jurisdiction because it has authority under the UEA to award restitution for violations of the Act. See N.J.S.A. 45:1-22(d). A similar argument was rejected by the Court in Campione, supra, 155 N.J. at 262. In Campione, defendant contended the Commission had exclusive jurisdiction in part because its governing statute permitted the Commission to award restitution. Ibid. The Court rejected the argument finding the statute did not allow for full vindication of all aspects of the plaintiff's damages claims and did "not authorize private litigants to initiate claims for money damages before the [Commission]." Ibid. The same is true here.

to questions which require interpretation of its regulations." Muise, supra, 332 N.J. Super. at 159. "Thus, 'when enforcement of a claim requires resolution of an issue within the special competence of an administrative agency, a court may defer to a decision of that agency.'" Estate of Kotksovaska, supra, 221 N.J. at 558 (quoting Campione, supra, 155 N.J. at 263-64).

Invocation of the doctrine of primary jurisdiction is within the sound discretion of the trial court. Ibid. We review a court's invocation of the doctrine for an abuse of discretion and will not reverse a court's decision unless it was "made without a rational explanation, inexplicably departed from established practices, or rested on an impermissible basis." Ibid. (quoting Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)).

Here, it does not appear the dismissal of the complaint was based on an invocation of the doctrine of primary jurisdiction. The court's order does not refer to the doctrine and the order's lack of any detailed findings or conclusions of law renders it impossible to ascertain whether the doctrine was invoked and, if so, whether its invocation constituted an abuse of discretion. See ibid. We cannot review a decision for an abuse of discretion where it appears the court did not make the decision in the first instance.

Moreover, if the court found the doctrine of primary jurisdiction applied, it would have been an error to dismiss the complaint on that basis. Where, as here, the Board could not grant relief on plaintiff's claims coextensive with the relief available in the court proceeding, invocation of the doctrine of primary jurisdiction does not warrant dismissal of a complaint. Under such circumstances, the primary jurisdiction doctrine requires "only a stay of the proceedings pending the agency's determination." Richardson v. Std. Guard. Ins. Co., 371 N.J. Super. 449, 475 (App. Div. 2004); accord Boldt, supra, 320 N.J. Super. at 89.

Because we have determined the court erred by dismissing the complaint based on its erroneous determination that the Board had exclusive jurisdiction over plaintiff's claims, on remand the court shall consider whether to invoke the doctrine of primary jurisdiction based on the factors relevant to that determination as defined by our Supreme Court in Estate of Kotsovska, supra, 221 N.J. at 588.<sup>6</sup> If the court determines to invoke the doctrine, it shall stay the court proceeding pending the Board's determination

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<sup>6</sup> In making a determination whether to invoke the doctrine of primary jurisdiction, a court is required to consider whether: "the matter at issue is within the conventional experience of judges"; "the matter is peculiarly within the agency's discretion, or requires agency expertise"; "inconsistent rulings might pose the danger of disrupting the statutory scheme"; and "prior application has been made to the agency." Ibid. (quoting Magic Petroleum Corp. v. Exxon Mobil Corp., 218 N.J. 390, 405 (2014)).

of any issues the court in its discretion finds the Board should resolve in the first instance. Richardson, supra, 371 N.J. Super. at 475.

We offer no opinion as to whether the court should invoke the doctrine; that determination must be made by the trial court. The court, however, shall make detailed findings of fact and conclusions of law supporting its decision on the issue. R. 1:7-4.

C. N.J.S.A. 56:8-140 and N.J.A.C. 13:28-6.1

It appears the court also dismissed the complaint based on a determination that N.J.S.A. 56:8-140 bars plaintiff's claims. The court's order vaguely states that the dismissal was required as "[p]er N.J.S.A. 56:8-140 [and N.J.A.C.] 13:28-6.1."

The statute is part of the Contractors Registration Act, N.J.S.A. 56:5-136 to -152, which requires the registration of "person[s] engaged in the business of making or selling home improvements." N.J.S.A. 56:8-137, -138(b). N.J.S.A. 56:8-140 exempts certain persons from the coverage of the Contractors Registration Act, but neither the act nor the exemption have any applicability here. Plaintiff does not allege defendant was a person engaged in the business of making or selling home improvements and does not assert any claims under the act. The

court, therefore, erred by concluding that N.J.S.A. 56:8-140 required dismissal of any of the claims asserted in the complaint.

The court also cited the regulation that "[l]icensed schools shall comply with all laws and rules relating to the practice of cosmetology" or "shall be subject to disciplinary action by the Board." N.J.A.C. 13:28-6.1. However, nothing in the act or regulation gives the Board exclusive jurisdiction or jurisdiction to grant damages.

In sum, we are convinced the court erred in dismissing the complaint based on its apparent determination that the Board had exclusive jurisdiction to decide plaintiff's causes of action and its clear determination that plaintiff's claims were legally barred under N.J.S.A. 56:8-140 and N.J.A.C. 13:28-6.1. We remand for further proceedings for the court to consider and decide, with detailed findings and conclusions of law, whether it should invoke the doctrine of primary jurisdiction.

The court also stated there was no private cause of action under N.J.S.A. 45:5B-3(h). However, plaintiff did not assert a private cause of action under N.J.S.A. 45:5B-3(h). Rather, plaintiff's complaint raised claims under the CFA, TCCWNA, breach of the covenant of good faith and fair dealing, and unjust enrichment. Plaintiff may assert claims under those statutes and



common law doctrines regardless of whether there is a private right of action under N.J.S.A. 45:5B-3(h).

Amici The Association of Cosmetology and Hairstyling Schools of New Jersey, Inc., and the Robert Fiance Beauty Schools, Inc., argue there were numerous other grounds supporting the dismissal of the complaint. The court's order and the record presented on appeal does not permit a determination as to whether the grounds asserted here were presented to the motion court. We generally decline to consider arguments that were not raised before the trial court and do not involve jurisdictional or public interest concerns, and we discern no basis for proceeding otherwise here. Zaman v. Felton, 219 N.J. 199, 226-27 (2014); see also Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) ("[O]ur appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959), certif. denied, 31 N.J. 554 (1960))). In any event, because the court decided it lacked jurisdiction and did not address any other putative bases for its dismissal of the complaint, on remand defendant shall be permitted to make any and all arguments supporting a motion to

dismiss pursuant to Rule 4:6-2(e), other than on grounds upon which we have directly ruled in this opinion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION