SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0330-21

CHERYL JACOB,

Plaintiff-Appellant,

v.

MARILYN WAINWRIGHT,

Defendant-Respondent,

and

JOHN SPARKS,

Defendant,

and

MARILYN WAINWRIGHT,

Third-Party Plaintiff-Respondent,

v.

GARY WEEKS QUARTER HORSES,

Third-Party Defendant.

Argued October 17, 2022 – Decided November 2, 2022

Before Judges Mawla, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Sussex County, Docket No. L-0506-16.

Gregg D. Trautmann argued the cause for appellant (Trautmann and Associates, LLC, attorneys; Gregg D. Trautmann, on the briefs).

Thomas W. Griffin argued the cause for respondent (Litvak & Trifiolis, PC, attorneys; Thomas W. Griffin, on the brief).

PER CURIAM

Plaintiff Cheryl Jacob appeals from the trial court's order dated August 25, 2021, dismissing her complaint with prejudice pursuant to Rule 4:37-2(b). The trial court dismissed the case based on plaintiff's failure to provide expert testimony on the issue of liability. In addition, the trial court determined the doctrine of res ipsa loquitur did not apply to the facts in this case. For the reasons that follow, we affirm the trial court's decision regarding the need for expert testimony and the inapplicability of res ipsa loquitur. However, because a different judge, earlier in the litigation, determined plaintiff did not need expert testimony to prove her case, we vacate the order dismissing plaintiff's

complaint and remand for a short period of discovery to allow the parties to secure experts.

On July 31, 2015, plaintiff and defendants, Marilyn Wainwright and John Sparks, attended the Sussex County Farm and Horse Show. At some point in the morning, Wainwright asked Sparks to hold her horse while she went to the restroom. Plaintiff observed Sparks outside of the facility's office where Wainwright was using the restroom. Just outside the office were pavers where people cleaned off their boots before entering the office, because the office has carpeting. Plaintiff claims Sparks, while sitting on the top rail of a fence, was "shanking" (pulling up and down) the horse's lead[1] because the horse was fidgety. As Sparks shanked the horse's lead to get its attention, the horse pulled its head back and forth. Plaintiff also observed the horse wearing steel shoes and its front hooves on the pavers. She also saw the horse was "scrambling on the pavers." Plaintiff subsequently heard a commotion and turned to see the horse falling on her, injuring her leg. Sparks testified the horse simply collapsed and fell without any warning, and he believed the horse may have had a health issue such as a "heatstroke or some type of seizure."

[1] According to the record, a lead, or lead rope, is used to lead or control a horse.

Plaintiff sued defendants for negligence. On November 28, 2018, Wainwright filed a motion for summary judgment, which the trial court granted. Plaintiff's failure to provide an expert was not an issue in this first summary judgment motion. At that time, Sparks had not yet appeared in the case. After Sparks answered and new facts came to light, plaintiff filed a motion for reconsideration to vacate the initial summary judgment order, which the court granted. Wainwright subsequently filed another motion for summary judgment and argued, among other issues, plaintiff needed expert testimony to prove negligence. The court denied the second motion for summary judgment and determined plaintiff did not need expert testimony, stating the issues presented were "not so esoteric that jurors of common knowledge and experience could not form a judgment" concerning issues of liability.[2] After the parties completed discovery, the case went to trial. A different judge oversaw the trial.

At trial, both defendants filed motions to dismiss plaintiff's complaint, pursuant to Rule 4:37-2(b), at the close of plaintiff's case-in-chief. The trial judge determined it was not within the common knowledge of average jurors to know whether Sparks mishandled the horse. The trial judge based this

[2] Discovery was extended at this time for plaintiff to obtain a medical damages report regarding plaintiff's need for a knee replacement.

determination on his understanding that "the average person doesn't know how to correctly handle a horse." To further illustrate this point, the judge pointed out that during argument, plaintiff's counsel had described himself as someone who is "not a horse person" and referred to a horse's lead as a "leash." The judge then added:

> [t]hat helps me to make a point that someone who has not worked with horses, someone who doesn't have training, experience, and knowledge as to how they handle horses would not know whether it's negligent to have a horse standing with steelshod shoes, front hooves on pavers nor would a person not skilled, educated, trained[,] and experience[d] with horses know whether shanking is an appropriate means of controlling the horse. This is specialized knowledge. It does not fall within the [ambit] of the common knowledge of a lay person.

He explained the case reached a "threshold of specialized knowledge," and the jurors needed an expert to explain the standard of care "since they don't know enough by way of common knowledge about how to handle horses in order to know whether there is a breach of duty . . . [or] a violation of care." In particular, the trial judge indicated the jury needed an expert to discuss whether, under the circumstances, the horse should not have been standing on pavers, shanked, or "controlled by a person sitting on a higher elevation on the railing fence . . . ."

The trial judge acknowledged the contrary summary judgment decision concerning expert testimony but indicated there were two reasons to deviate from the prior decision. First, he noted the motion judge's order was interlocutory and therefore not binding upon his decision. Second, the trial judge stated the motion judge based his decision on the facts presented during the motion, but he had the advantage of a full trial record that provided more clarity on the issue. He concluded that without the aid of expert testimony, the jury would be left to speculate how defendants breached any duty. Finally, the trial court ruled the doctrine of res ipsa loquitur did not apply to the facts in this case—agreeing with the motion judge's decision on that issue. The court granted the motions and dismissed plaintiff's complaint with prejudice. This appeal followed.

Plaintiff reprises the same arguments raised before the trial court. She argues the issue regarding whether Sparks breached a duty to plaintiff by shanking the horse, while the horse partially stood on pavers with steel shoes, does not require expert testimony. Plaintiff contends the motion judge properly determined the issue was not so esoteric and did not require a liability expert. Plaintiff further asserts, because the horse falling on her "bespeaks" negligence,

the trial court also erred in determining the doctrine of res ipsa loquitur does not apply.

I.

When considering a trial court's evidentiary rulings, our standard of review is well settled. "When a trial court admits or excludes evidence, its determination is 'entitled to deference absent a showing of an abuse of discretion, i.e., [that] there has been a clear error of judgment.'" Griffin v. E. Orange, 225 N.J. 400, 413 (2016) (quoting State v. Brown, 170 N.J. 138, 147 (2001)) (alteration in original). "Thus, we will reverse an evidentiary ruling only if it 'was so wide [of] the mark that a manifest denial of justice resulted.'" Ibid. (quoting Green v. N.J. Mfrs. Ins. Co., 160 N.J. 480, 492 (1999)).

"In most negligence cases, the plaintiff is not required to establish the applicable standard of care." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (citing Sanzari v. Rosenfeld, 34 N.J. 128, 134 (1961)). In those instances, "[i]t is sufficient for [the] plaintiff to show what the defendant did and what the circumstances were. The applicable standard of conduct is then supplied by the jury[,] which is competent to determine what precautions a reasonably prudent man in the position of the defendant would have taken." Id. at 406-07 (alterations in original) (citation omitted). "Such cases involve facts

about which 'a layperson's common knowledge is sufficient to permit a jury to find that the duty of care has been breached without the aid of an expert's opinion.'" Id. at 407 (quoting Giantonnio v. Taccard, 291 N.J. Super. 31, 43 (App. Div. 1996)).

"In some cases, however, the 'jury is not competent to supply the standard by which to measure the defendant's conduct,' and the plaintiff must instead 'establish the requisite standard of care and [the defendant's] deviation from that standard' by 'present[ing] reliable expert testimony on the subject.'" Ibid. (alterations in original) (citations omitted); see also N.J.R.E. 702 (permitting expert testimony "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue").

The Supreme Court has explained, "when deciding whether expert testimony is necessary, a court properly considers 'whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the [defendant] was reasonable.'" Davis, 219 N.J. at 407 (alteration in original) (quoting Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982)); see also Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387, 394 (2001) (holding expert testimony is not needed under the affidavit of merit statute when the jury's "common knowledge as lay persons is sufficient

to enable them, using ordinary understanding and experience, to determine a defendant's negligence" (quoting Est. of Chin v. Saint Barnabas Med. Ctr., 160 N.J. 454, 469 (1999))). In cases where "the factfinder would not be expected to have sufficient knowledge or experience[,]" expert testimony is needed because the jury "would have to speculate without the aid of expert testimony." Torres v. Schripps, Inc., 342 N.J. Super. 419, 430 (App. Div. 2001) (citing Kelly v. Berlin, 300 N.J. Super. 256, 268 (App. Div. 1997)).

Our courts have previously found expert testimony is required to establish an accepted standard of care with regard to: "ordinary dental or medical malpractice," Sanzari, 34 N.J. at 134-35; "the responsibilities and functions of real-estate brokers with respect to open-house tours," Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 444 (1993); "the safe conduct of a funeral procession," Giantonnio, 291 N.J. Super. at 44; the "conduct of those teaching karate," Fantini v. Alexander, 172 N.J. Super. 105, 108 (App. Div. 1980); "applying pertinent skydiving guidelines," Dare v. Freefall Adventures, Inc., 349 N.J. Super. 205, 215 (App. Div. 2002); the "repair and inspection" of automobile engines, Ford Motor Credit Co. v. Mendola, 427 N.J. Super. 226, 237 (App. Div. 2012); "the inspection of fire sprinklers by qualified contractors," Davis, 219 N.J. at 408; and the duties of a licensed nurse when "a patient dislodges [their]

[medical] tube and refuses its reinsertion," Cowley v. Virtua Health System, 242 N.J. 1, 9 (2020).

Conversely, our courts have found expert testimony is not required to establish the appropriate standard of care for explaining: "the dangers that might follow when a lit cigarette is thrown into a pile of papers or other flammable material[,]" Scully v. Fitzgerald, 179 N.J. 114, 127 (2004); whether an attorney in a malpractice suit should have "briefed an issue[,]" "report[ed] . . . settlement discussion[s] accurately[,]" or "recommend[ed] a disposition of the case" after settlement discussions, Sommers v. McKinney, 287 N.J. Super. 1, 12 (App. Div. 1996); or the "risk involved in [a chiropractor] repeating the further neck adjustment[s]" after the chiropractor knew the patient became uncharacteristically dizzy and unwell after treatment, Klimko v. Rose, 84 N.J. 496, 505 (1980).

Guided by these standards, we are satisfied the trial judge did not abuse his discretion in requiring expert testimony given the facts in this case. The trial court correctly determined the applicable standard of care was not within the ordinary ken of typical jurors, and plaintiff, therefore, required expert testimony on liability. Jurors of common judgment and experience would be unacquainted with the appropriate way to handle a horse under the circumstances. That is,

jurors would not be familiar with whether it was reasonable to shank the horse from an elevated position and allow it to stand with its front hooves on pavers. We conclude in such circumstances expert testimony was necessary to explain the standard of care and how, if at all, Sparks deviated from those standards in handling the horse.

In Pincus v. Sublett, we addressed the issue of whether it was proper for a trial court to admit expert testimony on the manner in which a horse should be ridden along a highway. 26 N.J. Super. 188, 191 (App. Div. 1953). In affirming the trial court's decision to admit expert testimony, we noted:

> In the instant case, the qualifications of the expert being conceded, the only issue as to his testimony was whether in this automobile age the principles of horsemanship have become so uncommon to the knowledge of mankind that the jury should have the benefit of an expert's peculiar knowledge and experience to aid in arriving at its verdict. While perhaps years ago a jury would not have required the assistance of expert testimony as to horsemanship, there was no error in its admission here.
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> [Id. at 192 (emphasis added).]

Like Pincus, the issue raised in this case is one that would require jurors to speculate as to the applicable standard of care when handling a horse. Considering this court found horsemanship to be a skill outside of an average juror's common knowledge in 1953, it is even more unlikely that an average

juror in New Jersey today—further removed from the days when horses were more commonly used—would possess such knowledge, skill, or experience to be able to properly determine the standard of care in this case.

II.

We need only briefly address plaintiff's contention that the doctrine of res ipsa loquitur applies under the facts of this case. The res ipsa loquitur doctrine permits an inference of negligence establishing a prima facie case of negligence. Jerista v. Murray, 185 N.J. 175, 191-92 (2005). To invoke the doctrine, a plaintiff must establish that "(a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality [causing the injury] 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." Szalontai v. Yazbo's Sports Cafe, 183 N.J. 386, 398 (2005) (alteration in original) (quoting Brown v. Racquet Club of Bricktown, 95 N.J. 280, 288 (1984)). Both the trial judge and motion judge rejected plaintiff's argument concerning the applicability of res ipsa loquitur.

"Whether an accident bespeaks negligence 'depends on the balance of probabilities.'" Jerista, 185 N.J. at 192 (quoting Buckelew v. Grossbard, 87 N.J. 512, 526 (1981)). Thus, the doctrine is available to a plaintiff "if it is more

probable than not that the defendant has been negligent." Myrlak v. Port Auth. of N.Y. and N.J., 157 N.J. 84, 95 (1999). The fact that the horse fell on plaintiff in this case does not necessarily bespeak negligence. The horse could have fallen for a variety reasons, many of which do not involve defendants' negligence. The facts in this case are far afield from those traditional cases applying res ipsa loquitur, such as a piano falling from a window, or a sponge being left in a patient. We are satisfied both the trial judge and motion judge correctly addressed this issue.

Plaintiff does not dispute the motion judge's interlocutory order was subject to revision but argues the trial judge merely "substituted its opinion for the [motion judge] without explanation of a fact or a legal opinion which was overlooked . . . [causing] prejudice to the plaintiff." We are unpersuaded.

A trial court has the inherent power "to review, revise, reconsider and modify its interlocutory orders at any time prior to the entry of final judgment." Lombardi v. Masso, 207 N.J. 517, 534 (2011) (citing Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 257 (App. Div.1987)). Rule 4:42-2(b) provides: "any order . . . which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of the claims, and it shall be subject to revision at any time before the entry of final judgment in the sound

discretion of the court in the interest of justice." The trial judge properly reconsidered the motion judge's decision and correctly determined plaintiff needed to prove liability through an expert as discussed above.

We part company with the trial court only on the issue of the ultimate dismissal of the case. First, we do not view the trial record as being substantially different from the record before the motion judge. Although we agree with the trial judge and his comprehensive, well-reasoned legal conclusions on the need for expert testimony, we remand because of the unusual procedural history leading to the dismissal. Plaintiff proceeded to trial with the understanding she was not required to secure expert testimony based on the motion court's ruling, but the court dismissed her complaint at trial because she failed to obtain an expert. To assure a just outcome, the parties should have an opportunity to secure experts so this matter can be adjudicated on its merits.

III.

We therefore affirm the trial judge's rulings insofar as he determined plaintiff was required to produce expert testimony to establish her claim. We also affirm the trial judge's holding rejecting plaintiff's argument regarding res ipsa loquitur. We vacate the order dismissing the complaint and remand for further proceedings consistent with this opinion. The trial court shall conduct a

case management conference within thirty days and fix reasonable deadlines for the parties to obtain experts and complete expert discovery.

Affirmed in part, vacated in part, and remanded. 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