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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0970-21**

FANG LIU,

Plaintiff-Appellant,

v.

AFFINITY CARE OF NJ,

Defendant-Respondent,

and

WELLCARE NEW JERSEY,

Defendant.

Argued November 9, 2022 – Decided December 2, 2022

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law
Division, Hudson County, Docket No. L-2170-21.

Fang Liu, appellant, argued the cause pro se.

William S. Bloom argued the cause for respondent
(Methfessel & Werbel, PC, attorneys; William S.
Bloom, on the brief).

PER CURIAM

In this medical malpractice action brought under the Wrongful Death Act, N.J.S.A. 2A:31-1 to -6, and the Survivor's Act, N.J.S.A. 2A:15-3, plaintiff Fang Liu appeals from the dismissal of her complaint for failure to state a claim upon which relief can be granted, and the denial of her motions for leave to file an amended complaint, discovery, and reconsideration. We reverse and remand.

On May 28, 2021, plaintiff filed a pro se complaint that alleged defendants Affinity Care of NJ and WellCare New Jersey committed malpractice by failing to provide homecare services to her eighty-two-year-old father, Zhaoyan Liu, between May 18, 2019, and his death on June 2, 2019. The complaint, which was typed on a form provided by civil case management, asserted a cause of action for wrongful death. It alleged Zhaoyan Liu, who suffered from Parkinson's disease, fell, and laid unattended on the floor for ten days until he died because homecare aides stopped providing services. It further alleged defendants engaged in a coverup by refusing to provide necessary information.

The complaint claimed that Zhaoyan Liu's death "caused tremendous trauma to Mr. Liu's wife, [Shuxian] Sun and other family member. [Shuxian] Sun's physical and mental health have deteriorated significantly." It also

claimed defendants' malpractice and refus[al] to release necessary documents to the Liu's family" caused "additional distress to the Liu's Family."

Plaintiff brought the action in her individual capacity. She had not yet been appointed administrator ad prosequendum or the administrator of decedent's estate. Plaintiff was appointed administrator ad prosequendum on September 29, 2021, and administrator of decedent's estate on October 14, 2021. Plaintiff remained pro se throughout the trial court proceedings.

Affinity Care of NJ moved to dismiss plaintiff's complaint under Rule 4:6-2(e), for failure to state a claim upon which relief can be granted. Plaintiff cross-moved for leave to file an amended complaint and for discovery. The proposed amended complaint included: (1) additional causes of action for negligence, negligence per se, claims under the Survivor's Act, intentional infliction of emotional distress, breach of contract, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, vicarious liability, violation of the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20, and fraudulent concealment; (2) additional alleged facts, injuries, and damages; and (3) an alternative business name for WellCare New Jersey. The proposed amended complaint alleged that plaintiff, decedent's spouse, and decedent's son suffered various damages. It did not change the named plaintiff or add additional plaintiffs.

Affinity Care of NJ argued that plaintiff did not have standing to bring her claims because in cases of intestacy, a wrongful death action can only be brought by an administrator ad prosequendum. Affinity Care of NJ also argued that if a decedent dies testate and his will is probated, the executor named in the will, or the administrator of the estate must bring the wrongful death action. Affinity Care of NJ maintained that a decedent's heirs may not sue for wrongful death damages in their individual capacities. Therefore, the complaint was a nullity.

In her opposition, plaintiff asserted that the complaint and proposed amended complaint met the requirements of the federal and state rules of civil procedure and the United States Constitution. She maintained that the claims were properly pled and based on federal and New Jersey law. Plaintiff noted she is the daughter, surviving family member, personal representative, and guardian of the decedent.¹ She claimed decedent's family emotional distress caused by defendants.

Affinity Care of NJ opposed the motion to amend the complaint, arguing it would be futile because the wrongful death claim was time-barred as of June 2, 2021, by the applicable two-year statute of limitations, N.J.S.A. 2A:31-3. It

¹ The complaint did not allege plaintiff was appointed guardian of the decedent. The record does not show whether plaintiff was appointed decedent's guardian by court order or judgment, or merely informally served as his "guardian."

also contended plaintiff did not have standing to sue when the complaint was filed, and the amendment could not relate back to the original filing date because plaintiff was not named administrator of decedent's estate until months after the statute of limitations had run.

On October 22, 2021, the court dismissed plaintiff's complaint without prejudice, denied plaintiff's motion to amend the complaint, and determined plaintiff's motion for discovery was moot. In its written statement of reasons, the court noted "plaintiff brought this action in her name only, and not in any fiduciary capacity," without first being appointed as the executrix or administratrix of the estate, or as administratrix ad prosequendum. It further noted that after the motion had been adjourned several times, plaintiff provided documentation showing that on September 29, 2021, she was appointed administratrix ad prosequendum but was "not appointed as a general administrator and was not empowered to receive any moneys in settlement." The court described the proposed amended complaint as amplifying the causes of action previously pled and adding contractual claims. The court reasoned:

The May 28, 2021 complaint sought compensation for the beneficiaries of Mr. Liu's estate for his alleged wrongful death. Additionally, the plaintiff sought money damages under a survivor's action. The plaintiff, however, brought these actions in her name only and not in the fiduciary capacity that is

required. Specifically, a wrongful death action "must be brought in the name of an [A]dministrator [A]d [P]rosequendum of the decedent for whose death damages are sought", or by the estate's executrix. N.J.S.A. 2A:31-2. Similarly, the Survivor's Act permits only an "execut[rix] suing on behalf of [an] estate to recover the damages [that the] testator would have had if [the testator were] living." Repko v. Our Lady of Lourdes Med. Ctr., Inc., 464 N.J. Super. 570, 577 (App. Div. 2020). Consequently, since the plaintiff only qualified as the administrator ad prosequendum on September 28, 2021, she was not entitled to "[s]et the judicial machinery in motion." Repko, 464 N.J. Super. at 574. The complaint is, therefore, as argued by the defendant, a nullity.

Consequently, the complaint is dismissed, without prejudice, and the motions that stem from that filing are dismissed as moot.

The plaintiff, however, is not without a remedy. Although any subsequent filing under the wrongful death or survivor actions might be barred by the statute of limitations that governs these actions, the breach of contract causes of action that she includes in the proposed amended complaint would not be similarly prohibited because of the longer limitations period. If recovery is sought under these causes of action, the plaintiff must bring a new complaint to do so.

[(Alterations in original).]

On November 19, 2021, the court issued an order and oral decision that denied plaintiff's motion for reconsideration.² Later that month, plaintiff filed this appeal and argues:

POINT I

THE TRIAL COURT ERRED IN BINDING A WRONG PRECEDENT IN THE DECISION MAKING AND HAVING NO LEGAL BASIS TO DISMISS PLAINTIFF'S COMPLAINT. (Not Raised Below).

POINT II

THE TRIAL COURT ERRED IN NOT PROVIDING DUE PROCESS FOR THE PLAINTIFF TO INITIATE THE CASE AT THE MEANINGFUL TIME IN THE MEANINGFUL MANNER AND ARBITRARILY CHANGING LEGAL BASIS IN THE DECISION MAKING DURING THE COURSE OF THE CASE. (Not Raised Below).

"In considering a motion to dismiss under Rule 4:6-2(e), courts search the allegations of the pleading in depth and with liberality to determine whether a cause of action is 'suggested by the facts.'" Rezen Family Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011) (quoting Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989)). They must "ascertain whether the fundament of a cause of action may be gleaned

² The record does not include a transcript of the motion hearing or oral decision.

even from an obscure statement of claim, opportunity being given to amend if necessary." Ibid. (quoting Printing Mart, 116 N.J. at 746). A pleading should be dismissed if it states no basis for relief and discovery would not provide one. Ibid. (citing Camden Cnty. Energy Recovery Assoc., L.P. v. N.J. Dep't of Env'tl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999), *aff'd*, 170 N.J. 246 (2001)).

On appeal, we apply a plenary standard of review to a trial court's decision to dismiss a complaint pursuant to Rule 4:6-2(e), Rezen, 423 N.J. Super. at 114 (citing Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005)), including the trial court's determination to dismiss based on lack of standing, Courier-Post Newspaper v. Cnty. of Camden, 413 N.J. Super. 372, 381 (App. Div. 2010), or the application of a statute of limitations, Barron v. Gersten, 472 N.J. Super. 572, 576 (App. Div. 2022). "We owe no deference to the trial court's conclusions." Rezen, 423 N.J. Super. at 114.

Important to this appeal, less than three months after the dismissal of the complaint and denial of the motion to amend it, and less than two months after the denial of reconsideration, the Legislature amended the Survivor's Act and the Wrongful Death Act. Regarding plaintiff's Survivor's Act claim, N.J.S.A. 2A:15-3 was amended on January 18, 2022, to permit "[e]xecutors, administrators, and administrators ad prosequendum" to file a Survivor's Act

action on behalf of a decedent. See L. 2021, c. 481. The amendment also added the following language in a new subsection (2):

2. In the case of a plaintiff qualified for appointment as administrator who was not yet appointed administrator at the time the plaintiff commenced an action under this section, the court may allow the plaintiff to be designated administrator for the purposes of this section and to allow the plaintiff to amend pleadings nunc pro tunc relating back to the plaintiff's first filed pleading to reflect the designation.

[L. 2021, c. 481, § 1.]

As to plaintiff's wrongful death claim, N.J.S.A. 2A:31-2 was also amended on January 18, 2022, to permit a wrongful death claim to "be brought in the name of an administrator ad prosequendum or administrator of the decedent" (with the will attached if the will is probated). The amendment also added a new subsection (b), which reads:

b. In the case of a plaintiff who is qualified for appointment as administrator ad prosequendum, executor, or administrator with the will annexed, as the case may be, but who was not yet appointed as such at the time the plaintiff commenced an action under this chapter, the court may allow the plaintiff to be designated administrator ad prosequendum, executor, or administrator with the will annexed, as the case may be, and to allow the plaintiff to amend pleadings nunc pro tunc relating back to the plaintiff's first filed pleading to reflect the designation.

[L. 2021, c. 481. § 2]

Both amendments took "effect immediately and shall apply to any action commenced on or after the effective date and to any action commenced prior to the effective date and not yet dismissed or finally adjudicated as of the effective date." L. 2021, c. 481, § 3. Notably, plaintiff's complaint was dismissed without prejudice.

The bill's sponsor explained that the legislation was proposed in direct response to the holding in an unpublished opinion of this court.

When a person dies without a will, the county surrogate will appoint a general administrator of the estate who, among other duties, is authorized to file any civil actions under the [S]urvivor's [A]ct. The surrogate will appoint an administrator ad prosequendum (generally the same person who is appointed general administrator) to file any civil actions under the [W]rongful [D]eath [A]ct.

In an unpublished decision, . . . the Appellate Division held that the decedent's daughter did not have standing to file a lawsuit under the [S]urvivor's [A]ct because she had not yet been appointed general administrator of her father's estate; she had been appointed only as [AAP], which entitled her to file suit under the [W]rongful [D]eath [A]ct (but not under the [S]urvivor's [A]ct). According to the daughter, the county surrogate had advised that it was necessary for her only to be appointed as administrator ad prosequendum in order to file the lawsuit, and disagreements with her siblings had led to a delay in her being able to seek appointment as general administrator. In the view of the sponsor, [the opinion] can lead to many cases brought under the [W]rongful

[D]eath [A]ct or the [S]urvivor's [A]ct being dismissed on a technicality.

This bill is intended to address the issue by providing that the court may appoint a person as an administrator or administrator ad prosequendum even if the person was not yet appointed as such at the time the person filed a lawsuit under the [W]rongful [D]eath [A]ct or [S]urvivor's [A]ct. The bill provides that the court could allow the person filing suit to be designated administrator ad prosequendum, executor, or administrator with the will annexed, as the case may be, and to allow the plaintiff to amend any pleadings relating back to the plaintiff's first filed pleading to reflect the designation.

The bill would take effect immediately. It would apply to any action commenced on or after the effective date and to any action commenced prior to the effective date and not yet dismissed or finally adjudicated as of the effective date.

[Sponsor's Statement to A. 6133 3-4 (L. 2021 c. 481).]

We recognize that plaintiff had not been appointed executor, administrator, or administrator ad prosequendum when the complaint was filed on May 28, 2021, or when the statute of limitations ran on June 2, 2021. However, she was appointed administrator ad prosequendum on September 29, 2021, and administrator of decedent's estate on October 14, 2021, before the complaint was dismissed without prejudice on October 22, 2021.

We must determine if the amendments to N.J.S.A. 2A:15-3 and N.J.S.A. 2A:31-2 are to be given pipeline retroactivity. Affinity Care of NJ contends the amendments apply prospectively. We review this contention de novo, as the issue of whether an amended statute applies retroactively is purely a legal one. Ardan v. Bd. of Review, 231 N.J. 589, 608 (2018).

When the bill was enacted in January 2022, plaintiff's appeal, which was filed on November 30, 2021, was pending before this court. Affinity Care of NJ does not contend this case was not "in the pipeline" when the Legislature acted.

We construe the statutes at issue in accordance with familiar principles. A statute's plain language serves as "the best indicator" of the Legislature's intent. DiProspero v. Penn, 183 N.J. 477, 492 (2005). "When the provisions of a statute are clear and unambiguous, they should be given their literal significance, unless it is clear from the text and purpose of the statute that such meaning was not intended." Turner v. First Union Nat'l Bank, 162 N.J. 75, 84 (1999). When we discern the meaning of the Legislature's selected words, we may "draw inferences based on the statute's overall structure and composition." State v. S.B., 230 N.J. 62, 68 (2017). If the Legislature's intent is clear on the face of the statute, then the "interpretive process is over." Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 195 (2007).

When determining whether to apply a statute retroactively, courts

consider (1) whether the Legislature intended to give the statute retroactive application and (2) whether retroactive application will result in either an unconstitutional interference with vested rights or a manifest injustice. Applying the first prong of the retroactivity standard, we recognize three circumstances that justify affording a statute retroactive effect: (1) when the Legislature expresses its intent that the law apply retroactively, either expressly or implicitly; (2) when an amendment is curative; or (3) when the expectations of the parties so warrant.

[Arden, 231 N.J. at 610 (citations omitted).]

Here, the amendments were curative by eliminating a harsh procedural formality that led to the dismissal of potentially meritorious claims.

The amendment to the Survivor's Act was clearly intended to permit an administrator ad prosequendum to file complaints under the Survivor's Act and that amendment applied to cases that were still pending at the time of its enactment. The relation back provision of section (2) applies when a complaint has been filed by an individual who is neither an executor, administrator, nor an administrator ad prosequendum at the time of the filing, but later qualifies for appointment while the action is pending.

It is also clear that the enactment of subsection (b) was intended to permit a plaintiff to file an amended complaint when subsequently appointed as

administrator ad prosequendum, executor, or administrator with the will annexed, with the amendment relating back to the date of the original filing.

We conclude the express language of the statute made the amendments applicable to both pending cases and cases, like this one, that are "in the pipeline." We therefore hold that the amendments are to be given pipeline retroactivity and apply to this case. This determination of the Legislature's intent is entirely consistent with the accompanying sponsor's statement.

Here, the dismissal was without prejudice. This appeal had not been finally adjudicated when the amendments were enacted into law. Therefore, plaintiff should have been permitted to pursue the Survivor's Act and Wrongful Death Act claims by filing an amended complaint.

Because plaintiff was appointed both administrator ad prosequendum and general administrator of the decedent's estate before the complaint was dismissed, the amended statutes cloaked plaintiff with standing relating back to the date the complaint was filed. Accordingly, survival and wrongful death causes of action are not time-barred and amending the complaint is not futile.

We recognize, however, that plaintiff must plead her appointment as administrator ad prosequendum and general administrator of the decedent's estate in the amended complaint. In addition, as we now explain, plaintiff is not

permitted to file a pro se amended complaint and must be represented by a licensed attorney.

Plaintiff was not represented by counsel at any stage in the proceedings. Individual litigants generally do not have standing "to assert the rights of third parties." Stubaus v. Whitman, 339 N.J. Super. 38, 47-48 (App. Div. 2002). And, under our court rules, an individual who is not a licensed attorney in this State generally cannot appear on behalf of a third party. See R. 1:21-1(a) (except as provided by Rule 1:21-1, no person is permitted to practice law in this State unless they are a licensed attorney). Thus, an individual acting as a fiduciary or in another representative capacity, asserting claims for a decedent or an estate, cannot appear and prosecute the claim pro se. Kasharian v. Wilentz, 93 N.J. Super. 479, 482 (App. Div. 1967); R. 1:21-1(a); accord Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 1:21-1 (2023) ("prohibit[ing] such appearances by non-lawyer fiduciaries where the action involves another's beneficial interests").

Both Survivor's Act and Wrongful Death Act lawsuits are filed on behalf of third parties, not an individual plaintiff. See Kasharian, 93 N.J. Super. at 482 (explaining that a plaintiff prosecutes a wrongful death action "solely as administrator ad prosequendum in the interest of the entire class of the next of

kin of the decedent"); Smith v. Whitaker, 160 N.J. 221, 233 (1999) ("[T]he Survivor's Act preserves to the decedent's estate any personal cause of action that decedent would have had if he or she had survived.").

The Survivor's Act permits only certain representatives "suing on behalf of [an] estate, to recover the damages [the] 'testator . . . would have had if [the testator] was living.'" Repko, 464 N.J. Super. at 577 (third alteration in original) (quoting N.J.S.A. 2A:15-3). The damages recoverable under the Survivor's Act contemplates compensation to the decedent's estate, not directly to his widow or next of kin. Kern v. Kogan, 93 N.J. Super. 459, 471-72 (Law Div. 1967).

Similarly, a wrongful death action must "be brought in the name of an administrator ad prosequendum or administrator of the decedent for whose death damages are sought," or by an executor where the decedent's will was probated, N.J.S.A. 2A:31-2(a), and any recovery belongs to the decedent's heirs, see N.J.S.A. 2A:31-4. And, as we observed in Kasharian, 93 N.J. Super. at 482, a wrongful death action cannot be brought by an administrator ad prosequendum on behalf of other claimants or heirs of the estate without representation by an attorney qualified to practice law in this State.

We reverse the dismissal of the complaint and the denial of plaintiff's motion to file an amended complaint. On remand, plaintiff must be represented

by an attorney, who shall draft, file, and serve the amended complaint, which shall set forth the causes of action being pursued and the status of plaintiff's appointment as administrator ad prosequendum and administrator of decedent's estate. Plaintiff must be represented by an attorney throughout the renewed trial court proceedings.

Plaintiff argues her due process rights were violated because the pro se packet provided by case management did not advise her that she needed to be appointed as administrator ad prosequendum. Because we rule in plaintiff's favor on other grounds, we do not reach this constitutional issue. See Randolph Town Ctr., LP v. County of Morris, 186 N.J. 78, 80 (2006) ("Courts should not reach a constitutional question unless its resolution is imperative to the disposition of litigation.").

In light of our decision, we do not separately address the denial of plaintiff's motion for reconsideration.

The trial court determined that plaintiff's motion for discovery was moot. Plaintiff may renew her motion for discovery after filing and serving her amended complaint for consideration in the first instance by the trial court.

Reversed 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