

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the 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-0760-21**

RITA MANTINEO,
an incapacitated person, and
ROSEMARY MANTINEO
as guardian of her person
and property,

Plaintiffs-Appellants/
Cross-Respondents,

v.

ALLAIRE REHAB & NURSING,
JESSE IFRAH, personally and in
his capacity as former administrator
of **ALLAIRE REHAB & NURSING,**
and **FAMILY AND CHILDREN**
SERVICES,

Defendants-Respondents/
Cross-Appellants.

Argued February 15, 2023 - Decided May 1, 2023

Before Judges Currier, Enright and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law
Division, Monmouth County, Docket No. L-0012-21.

Doris Lin argued the cause for appellants/cross-respondents (Law Offices of Doris Lin, attorneys; Doris Lin, on the briefs)

Alex Raybould argued the cause for respondents/cross-appellants Allaire Rehab & Nursing and Jesse Ifrah (Lewis Brisbois Bisgaard & Smith, LLP, attorneys; Alex Raybould, on the briefs).

Shannon Fury Curtis argued the cause for respondent/cross-appellant Family and Children Services (Gelson D'Apolito & Curtis LLC, attorneys; Shannon Fury Curtis, on the briefs).

PER CURIAM

This case arises out of plaintiff RoseMary¹ Mantineo's claim that her elderly mother, Rita Mantineo (Mantineo) was held against her will at Allaire Rehabilitation & Nursing (Allaire) between January 5, 2019 and March 22, 2019, at the direction of defendants Family and Children Services (FCS) Adult Protective Services Unit (APS) in Monmouth County,² Allaire, and Jesse Ifrah, Allaire's administrator.

¹ We refer to RoseMary by her first name to avoid confusion; no disrespect is intended. As there were multiple spellings of RoseMary's name, we use the iteration utilized in plaintiffs' briefs.

² APS receives and investigates reports of abuse, neglect, and exploitation of vulnerable adults. FCS is the nonprofit social service agency designated by the State of New Jersey to operate the APS unit in Monmouth County.

The parties filed dueling motions for summary judgment and FCS moved for counsel fees. Plaintiffs appeal from the trial court's September 29, 2021 orders granting defendants' motion for summary judgment and denying plaintiffs' motion for partial summary judgment. FCS cross-appeals from the September 29, 2021 order denying its application for counsel fees.

In October 2018, APS received a call regarding then-ninety-four-year-old Mantineo. The caller reported that Mantineo looked unclean, her clothing smelled, and she "was being discharged from her day program" for acting in an inappropriate manner and displaying "aggression." In addition, the caller stated the home Mantineo lived in with RoseMary had no water, a leaky roof, crumbling drywall, and electrical issues.

APS initiated an investigation and visited the home five times. APS workers found Mantineo was confused, disoriented, and living in an unsanitary hoarding environment. Mantineo stated she used a toilet outside in the backyard. She was unable to answer questions about her medical needs, daily activities, or finances. APS instructed RoseMary to clean her home and make necessary repairs. RoseMary agreed to admit Mantineo to Allaire in December 2018 while she cleaned and repaired her house.

On February 1, 2019, APS filed a complaint to have Mantineo adjudicated as an incapacitated person and to be appointed guardian over her person and property (the guardianship action). The court-appointed counsel for Mantineo issued a report stating Mantineo was "unable to govern herself and manage her [own] affairs and require[d] a legal guardian." However, the attorney did not recommend RoseMary to be Mantineo's guardian until RoseMary had cleaned up her home and it was safe for Mantineo to live there.

During this same timeframe, Mantineo filed a complaint alleging defendants were not permitting her to leave the facility with RoseMary to go out to lunch. Mantineo stated defendants told her she was "not allowed to leave the facility without a court order". Mantineo subsequently filed an amended complaint asserting violations of numerous statutes and administrative regulations (the March 2019 litigation). Allaire and FCS moved to dismiss the March 2019 litigation for failure to state a cause of action.

On March 25, 2019, Mantineo was temporarily adjudicated as an incapacitated person in the guardianship action, pending the appointment of a temporary guardian. The court appointed a guardian ad litem several weeks later. Following the appointment of the guardian, RoseMary was permitted to take Mantineo out of Allaire for lunch and on other outings.

In May 2019, the Chancery judge dismissed the March 2019 litigation without prejudice. The judge found it "abundantly clear" that Mantineo "did not have the capacity on March 8, 2019 to file the complaint or on March 11, 2019 to file the amended complaint and sign the verification." In addition, the judge stated the complaint "charg[ed] [FCS] with violations of statutes that, on their face, do not apply to that entity, reli[ed] on criminal statutes that are not subject to prosecution in this civil court and . . . the injunctive relief sought ha[d] been rendered moot."

In September 2019, the Chancery judge again adjudicated Mantineo to be incapacitated in the guardianship action and appointed the Public Guardian for Elderly Adults as her permanent guardian.

RoseMary filed a petition to assume guardianship of her mother in January 2020. In support of her guardianship application, RoseMary asserted she had cleaned up the house and there was no longer a need for Mantineo to remain at Allaire. After the court granted the application, Mantineo moved back in with RoseMary.

In January 2021, Mantineo³ filed a complaint against defendants, alleging a violation of her rights between January 5, 2019 and March 22, 2019 (January 2021 litigation). Count one alleged defendants violated: N.J.S.A. 2C:13-3 (false imprisonment); N.J.A.C. 8:39-4.1(a)(25) (right to leave the nursing home during the day); N.J.A.C. 8:39-4.1(a)(27) (right to attend outside religious services); and N.J.A.C. 8:39-4.1(a)(30) (right to discharge oneself). Counts two and three alleged that Allaire and Ifrah violated: 42 U.S.C. § 1395i-3(c)(1)(A)(vi) (right to voice grievances without reprisal); 42 U.S.C. § 1395i-3(c)(3)(C) (right to immediate access by visitors); 42 U.S.C. § 1395i-3(c)(3)(D) (right to reasonable access by any individual that provides legal services); N.J.A.C. 8:39-4.1(a)(23) (right to meet with any visitors of resident's choice); and N.J.A.C. 8:39-4.1(a)(35) (right to voice complaints without being threatened or punished).

FCS served plaintiffs with a frivolous litigation lawsuit letter, pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1.

Defendants answered the complaint. Plaintiffs did not request any discovery.

³ An amended complaint was filed in August 2021 adding RoseMary as an additional plaintiff, as Mantineo's guardian.

After Allaire and Ifrah moved for summary judgment, FCS cross-moved for summary judgment. In its motion, FCS included a request for attorney's fees and costs, under N.J.S.A. 2A:15-59.1 and Rule 1:4-8.

Plaintiffs filed a cross-motion for partial summary judgment against Allaire and Ifrah, and a brief opposing defendants' summary judgment motions. Plaintiffs' statement of material facts reiterated the allegations in their complaint.

Plaintiffs did not submit an affidavit, certification, or other document in opposition to defendants' motions. Plaintiffs also did not dispute Allaire's and Ifrah's statement of undisputed material facts. Therefore, those facts are deemed admitted for the purposes of the motion. See R. 4:46-2(b).

On September 29, 2021, the judge issued three separate orders on the motions, granting Allaire's and Ifrah's motion and dismissing plaintiffs' amended complaint; granting FCS's cross-motion for summary judgment; denying plaintiffs' motion for partial summary judgment with prejudice; and denying FCS's motion for counsel fees.

Each of the three orders contained the following statement of reasons:

This is not the first time that plaintiff has run afoul of the Court Rules. In fact, the underlying decision at issue was based upon a [c]omplaint that was filed by someone without authority to act on plaintiff's

behalf. That [c]omplaint was dismissed for the reasons stated on the record on March 18, 2021^[4]

Substantively, however, both APS and FCS are entitled to immunity based upon N.J.S.A. 52:27D-409 and quasi-judicial immunity under Delbridge v. Schaeffer, 238 N.J. Super. 323 (1989). Those defendants were acting within the scope of their duties and without any malice or willful misconduct. As for the false imprisonment claim against Allaire Rehabilitation, the facts set forth by defendants demonstrate that plaintiff does not submit any evidence with a citation to the record that plaintiff was unlawfully admitted to Allaire Rehabilitation and/or unlawfully required to stay there for the time period at issue. Because the parties do not dispute that plaintiff's daughter did not have authority to file the prior [c]omplaint, which was dismissed, and that she has the authority to file the within [c]omplaint, the [c]ourt does not find that this constitutes frivolous litigation under N.J.S.A. 2A:15-59.1.

In addition, in denying plaintiffs' motion for partial summary judgment, the court found plaintiffs failed to comply with Rule 4:46-2(a) and (b), "making it impossible for the [c]ourt to verify any of the facts asserted."

On appeal, plaintiffs contend the court erred in denying their summary judgment motion and in granting summary judgment to defendants. FCS cross-

⁴ After the filing of the notice of appeal, the court issued an amended order to clarify the March 2019 litigation was dismissed on May 10, 2019, not March 18, 2021.

appeals, asserting the court abused its discretion in denying its attorney's fee application.⁵

Our review of a summary judgment order is de novo. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). Summary judgment must be granted 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 or order as a matter of law." R. 4:46-2(c). It should be granted when, considering the competent evidence presented, viewed in the light most favorable to the non-moving party, there is "no genuine issue as to any material fact challenged" and "the moving party is entitled to a judgment or order as a matter of law." Ibid.; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

Conclusory statements within the pleadings, without factual support in the record, are insufficient to create a disputed question of fact. Sullivan v. Port

⁵ After submission of the appellate briefs, counsel advised the court that Mantineo had passed away and RoseMary was the administrator of Mantineo's estate.

Auth. of N.Y. and N.J., 449 N.J. Super. 276, 279-80 (App. Div. 2017). Likewise, "conclusory and self-serving assertions by one of the parties are insufficient to overcome the motion." Puder v. Buechel, 183 N.J. 428, 440-41 (2005) (citations omitted).

We begin with the allegations against Allaire and Ifrah. We note initially that the 2021 complaint was identical to the previously dismissed 2019 complaint.

Count one alleges that "[i]n not allowing [Mantineo] to leave Allaire, [d]efendants have violated [Mantineo's] rights under N.J.S.A. 2C:13-3 (false imprisonment), N.J.A.C. 8:39-4.1(a)(25) (right to leave the nursing home during the day), N.J.A.C. 8:39-4.1(a)(27) (right to attend outside religious services), N.J.A.C. 8:39-4.1(a)(30) (right to discharge oneself)."

The parties do not dispute Mantineo was admitted for her own safety to Allaire in December 2018 upon the recommendation of APS. RoseMary confirmed this in her certification when she sought guardianship of her mother in 2020, stating she placed Mantineo in Allaire for "respite care" while she cleaned out the house.

It is also undisputed that RoseMary was not Mantineo's guardian during Mantineo's stay at Allaire. The court appointed a guardian for Mantineo in

February 2019. The following month, the Public Guardian for Elderly Adults was appointed as Mantineo's temporary guardian. RoseMary did not assume guardianship of her mother until sometime in 2020. Therefore, RoseMary did not have the legal authority to make any decisions on Mantineo's behalf while she was at Allaire.

In response to Allaire's and Ifrah's summary judgment motion, plaintiffs did not provide the trial court with any authority or support for the assertions in the complaint. As Mantineo could not assert the delineated administrative regulation rights on her own behalf while at Allaire, only the court-appointed guardian had the authority to exercise those rights for her. Plaintiffs presented no proof that the guardian exercised those rights or authorized Allaire to release Mantineo from the facility with RoseMary while the abuse investigation and guardianship proceedings were pending. Therefore, plaintiffs could not withstand summary judgment on the violation of the administrative regulations.

As for the claim of false imprisonment, this is a criminal charge. Plaintiffs cannot allege the violation of a criminal statute against a party in a civil complaint.

In counts two and three, plaintiffs alleged Allaire and Ifrah violated Mantineo's rights under several federal statutes and additional New Jersey

administrative regulations when Ifrah told plaintiffs' counsel he could "ban her" and "anyone he wants" from the nursing home. Specifically, plaintiffs alleged violations of

42 U.S.C. § 1395i-3(c)(1)(A)(vi) (right to voice grievances without reprisal), 42 U.S.C. § 1395i-3(c)(3)(C) (right to immediate access by visitors[]), 42 U.S.C. § 1395i-3(c)(3)(D) (right to reasonable access by any individual that provides legal services), N.J.A.C. 8:39-4.1(a)[(]23[])] (right to meet with any visitors of resident's choice), [and] N.J.A.C. 8:39-4.1(a)[(]35[])] (right to voice complaints without being threatened or punished).

Again, plaintiffs have not supported these allegations. The only factual assertion is that Ifrah made this statement. Even considering the statement in the light most favorable to plaintiffs, they provide no legal basis that the statement alone supported the listed causes of action. Moreover, plaintiffs do not assert Mantineo was ever denied the right to see any visitor, including her current attorney, nor that she was threatened or punished because of any complaints she may have voiced. The trial court properly granted Allaire and Ifrah summary judgment.

The only allegations against FCS are in count one, in which plaintiffs alleged false imprisonment and violations of N.J.A.C. 8:39-4.1. As stated, plaintiffs do not have standing to assert a violation of a criminal statute as a

cause of action in their civil complaint. And the regulations under N.J.A.C. 8:39-4.1 only apply to long-term facilities licensed by the State of New Jersey. FCS is not a long-term care facility. N.J.A.C. 8:39-1.1 to 1.2. As plaintiffs could not support their causes of action, the court properly granted summary judgment to FCS.

Because we conclude there were no genuine issues of material fact to preclude the grant of summary judgment and plaintiffs did not support their legal causes of action, we need not address whether defendants were entitled to immunity as discussed by the trial court. Any remaining arguments not addressed by this court lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

In its cross-appeal, FCS contends the trial court abused its discretion in denying its request for counsel fees because it had to defend against plaintiffs' frivolous litigation twice. Although Allaire and Ifrah also filed a cross-appeal, the only party that moved for counsel fees before the trial court was FCS. Allaire and Ifrah cannot now complain about relief they did not seek in the trial court. Therefore, we do not consider Allaire's and Ifrah's cross-appeal. And even if we did, like that of FCS, we would find it to be without merit.

The granting of counsel fees is a matter left to the trial court's discretion and fee determinations should be disturbed only where there has been a clear abuse of discretion. Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (quoting Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001)). A trial court's decision will constitute an abuse of discretion where "the 'decision [was] made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Saffos v. Avaya Inc., 419 N.J. Super. 244, 271 (App. Div. 2011) (alteration in original) (quoting United States v. Scurry, 193 N.J. 492, 504 (2008)).

N.J.S.A. 2A:15-59.1 and Rule 1:4-8(d) permit a court to award attorney's fees for the filing of frivolous litigation. N.J.S.A. 2A:15-59.1 states:

a. (1) A party who prevails in a civil action, either as plaintiff or defendant, against any other party may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the nonprevailing person was frivolous.

. . . .

b. In order to find that a complaint, counterclaim, cross-claim or defense of the nonprevailing party was frivolous, the judge shall find on the basis of the pleadings, discovery, or the evidence presented that either:

(1) The complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or

(2) The nonprevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

The granting of counsel fee awards under N.J.S.A. 2A:15-59.1 has been approached with caution, "so that while baseless litigation will be deterred, 'the right of access to the court should not be unduly infringed upon, honest and creative advocacy should not be discouraged, and the salutary policy of the litigants bearing, in the main, their own litigation costs, should not be abandoned.'" Gooch v. Choice Entertaining Corp., 355 N.J. Super. 14, 18 (App. Div. 2002) (quoting Iannone v. McHale, 245 N.J. Super. 17, 28 (App. Div. 1990)). The term "frivolous," as used in N.J.S.A. 2A:15-59.1, must be given a restrictive interpretation. McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 561 (1993). A claim will only be deemed frivolous "when no rational argument can be advanced in its support, when it is not supported by any credible evidence, when a reasonable person could not have expected its success, or when it is completely untenable." Belfer v. Merling, 322 N.J. Super.

124, 144 (App. Div. 1999). A losing party will not be found to have acted in bad faith when their conduct "bespeaks an honest attempt to press a perceived, [though] ill-founded" and perhaps misguided claim. McKeown-Brand, 132 N.J. at 563.

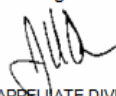
In denying the motion for attorney's fees, the trial judge stated: "Because the parties do not dispute that plaintiff's daughter did not have authority to file the prior [c]omplaint, which was dismissed, and that she has the authority to file the within [c]omplaint, the [c]ourt does not find that this constitutes frivolous litigation under N.J.S.A. 2A:15-59.1."

Contrary to FCS's contentions, the 2019 complaint was dismissed without prejudice for several reasons, including a finding that Mantineo lacked the capacity to sign the pleadings. There was no finding that plaintiffs filed the 2019 complaint in bad faith. To the contrary, plaintiffs were permitted to file a new complaint. Therefore, there is no support for FCS's assertion that plaintiff filed the January 2021 litigation to harass FCS.

We see no reason to disturb the judge's exercise of discretion in denying the motion for counsel fees.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION