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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1817-21**

NITIN SORATHIA,

Plaintiff-Appellant,

v.

NEW JERSEY TRANSIT
CORPORATION,

Defendant-Respondent.

Submitted January 30, 2023 — Decided February 7, 2023

Before Judges Mawla and Marczyk.

On appeal from the Superior Court of New Jersey, Law
Division, Middlesex County, Docket No. L-7177-19.

Nitin Sorathia, appellant pro se.

Matthew J. Platkin, Attorney General, attorney for
respondent (Sookie Bae-Park, Assistant Attorney
General, of counsel; Steven Brikowski, Deputy
Attorney General, on the brief).

PER CURIAM

Plaintiff Nitin Sorathia appeals from a February 4, 2022 order granting defendant New Jersey Transit Corporation (NJT) summary judgment dismissing his complaint with prejudice. We affirm.

In August 2019, plaintiff boarded an NJT passenger train at Metropark Station. He moved from the first car into the second, where an unknown woman assaulted him. During his deposition, plaintiff was asked if he heard anything from the woman before the assault, and he testified: "Absolutely not. She just came out of the blue and hit me. I don't know why." NJT conductors and passengers stopped the train and removed the assailant. Plaintiff was instructed to get off at the following stop and file a police report. He refused medical treatment.

Plaintiff filed a complaint against NJT for negligence, alleging the assailant struck him with a cane on his "right [side] neck and right bicep" resulting in a "severe [i]njury on his neck" causing him to go to the hospital. He alleged NJT was negligent for failing to remove the woman who "was cursing all the way from Trenton." He claimed "permanent[,] residual pain, disability[,] and impairment[.]" and his injuries required him "to seek out medical and surgical treatment, preventing [him] from attending [his] normal activities and

affairs" The complaint sought compensatory damages and costs of suit and asserted a loss of consortium claim on behalf of plaintiff's wife.

Following the discovery end date, and mandatory arbitration, which assessed no liability to NJT, plaintiff provided two witness statements from persons who allegedly witnessed the assault. One witness, who "vaguely" recalled witnessing the assault, stated it came "out of the blue," and the assailant "appeared deranged, behaving erratically. She was mumbling to herself and then suddenly raised her voice, addressing [plaintiff]"

The second witness stated he informed an Amtrak engineer, not an NJT conductor, about the woman's behavior. The witness recounted he and his wife moved to the other side of the train car at the West Windsor Station because "the woman appeared to be in psychological distress[and] was yelling, cursing, and banging on the floor with her cane." According to the witness, the woman assaulted plaintiff after he boarded, and an Amtrak engineer pulled the cane away from her and called NJT conductors who removed her.

NJT moved for summary judgment, arguing plaintiff admitted the attack came out of the blue, and NJT could not have breached its duty of care because the incident was unforeseeable. NJT contended although there was evidence of the woman behaving erratically, there was no evidence she was dangerous or

that it was reasonably foreseeable she would be dangerous. It argued plaintiff failed to adduce evidence of permanent loss of bodily function, disfigurement, or dismemberment sufficient to obtain a recovery.

The motion judge rendered a detailed oral opinion and concluded plaintiff's negligence claim could not survive summary judgment because the undisputed facts showed the attack was unprovoked and without explanation. She found "[a]lthough the assailant presented erratic behavior, [there was no dispute] she was not violent until [she attacked plaintiff]." Therefore, "[n]either . . . [p]laintiff nor the witnesses nor the Amtrak engineer or the conductor had any reason to believe she was doing anything other than being erratic, which . . . in and of itself [was not enough] to remove her from the train." No one alerted an NJT employee the woman posed a threat or was acting violently. The erratic behavior "didn't sufficiently put [NJT] on notice of impending attack."

Citing Maison v. New Jersey Transit Corporation,¹ the judge noted common carriers like NJT have a duty to protect passengers from the wrongful acts of other passengers. The judge quoted portions of the following passage from Maison:

[A]lthough private and public common carriers must exercise a duty of care "consistent with the nature of

¹ 245 N.J. 270 (2021).

[their] undertaking," . . . they are not absolute guarantors of their passengers' safety and they cannot protect against all possible dangers Carriers are liable only for the wrongful acts of co-passengers who present "dangers that are known or are reasonably foreseeable," and only "if the utmost care could have prevented" the harm.

[Id. at 297.]

The judge concluded the unexpected nature of the attack made it unforeseeable, and "[t]here is nothing . . . [NJT] employees could have done to prevent the danger presented by the assailant."

On appeal, plaintiff argues the motion judge should not have granted summary judgment because she is the daughter of a friend with whom plaintiff "always fight[s]," and therefore there was a conflict of interest. He argues dismissal of the complaint was unwarranted because NJT acknowledged the assault.

An appellate court need not consider questions not properly presented to a trial court unless the issue raised relates to the jurisdiction of the trial court or concerns a matter of great public interest. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Plaintiff's argument regarding the alleged conflict of interest was not raised before the motion judge and does not implicate the jurisdictional or public interest exceptions to the bar on raising arguments on

appeal for the first time. Rule 1:12-2 requires a party seeking a judge's disqualification to do so "on [a] motion made to the judge before trial or argument and stating the reasons therefor" For these reasons, we decline to consider this claim on appeal.

We review summary judgment motions de novo, using the same standard as that employed by the trial court. Hinton v. Meyers, 416 N.J. Super. 141, 146 (App. Div. 2010) (citing Turner v. Wong, 363 N.J. Super. 186, 198-99 (App. Div. 2003)). Rule 4:46-2 provides that a court should grant summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, along with any affidavits, show there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Whether a genuine issue of material fact exists requires "the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

To sustain a cause of action for negligence, the plaintiff must establish the following four elements: 1) duty of care, 2) breach of that duty, 3) proximate cause, and 4) damages. Townsend v. Pierre, 221 N.J. 36, 51 (2015) (citing Polzo

v. Cnty. of Essex, 196 N.J. 569, 584 (2008)). The plaintiff must do so "by some competent proof." Ibid. (quoting Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014)).

The question whether a duty exists is a matter of law. Carvalho v. Toll Bros., 143 N.J. 565, 572 (1996) (citations omitted). Foreseeability of the injury is a "crucial element" in determining whether the imposition of a duty is appropriate; "[o]nce the foreseeability of an injured party is established, . . . considerations of fairness and policy govern whether the imposition of a duty is warranted." Id. at 572-73 (second alteration in original) (quoting Carter Lincoln-Mercury, Inc. v. EMAR Grp., Inc., 135 N.J. 182, 194-95 (1994)). "The analysis is both very fact-specific and principled; it must lead to solutions that properly and fairly resolve the specific case and generate intelligible and sensible rules to govern future conduct." Vizzoni v. B.M.D., 459 N.J. Super. 554, 568 (App. Div. 2019) (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993)). Assessing fairness and policy requires consideration of several factors, including the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution. Carvalho, 143 N.J. at 573 (citing Hopkins, 132 N.J. at 439).

Having conducted our de novo review of the record pursuant to these principles, we affirm substantially for the reasons expressed in the motion judge's thorough and well-reasoned opinion. Viewed in the light most favorable to plaintiff, the facts and evidence in the record failed to demonstrate NJT breached the duty of care to plaintiff and that it was the proximate cause of his injuries. For these reasons, summary judgment in NJT's favor was properly granted.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION