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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1991-21**

CAESAR D. BRAZZA, ESQ.,
individually and as partner of the
law firm known as BRAZZA LAW,
LLC,

Plaintiff-Appellant/
Cross-Respondent,

v.

STUART KAGEN, ESQ., JOSHUA
GILLETTE, ESQ., KAGEN
CASPERSEN & BOGART PLLC,
VINCENT REILLY, ESQ., and
KINNEY LISOVICZ REILLY &
WOLFF, PC,

Defendants-Respondents/
Cross-Appellants.

Argued on June 15, 2023 – Decided July 10, 2023

Before Judges Currier, Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law
Division, Passaic County, Docket No. L-3254-21.

Caesar D. Brazza argued the cause for appellant/cross-respondent (Brazza Law, LLC, attorneys; Caesar D. Brazza, on the briefs).

Deirdre T. Cooney and Peter E. Mueller argued the cause for respondents/cross-appellants (Walsh Pizzi O'Reilly Falanga LLP, attorneys for respondents/cross-appellants Stuart Kagen, Esq., Joshua Gillette, Esq., and Kagen Caspersen & Bogart PLLC; Harwood Lloyd LLC, attorneys for respondents/cross-appellants Kinney Lisovicz Reilly & Wolff, PC, and Vincent Reilly, Esq.; Peter J. Pizzi and Peter E. Mueller, of counsel and on the joint briefs; Deirdre T. Cooney and Eileen P. Kuzma, on the joint briefs).

PER CURIAM

Plaintiff Caesar D. Brazza appeals from a January 21, 2022 order dismissing his amended complaint with prejudice. Defendants Stuart Kagen, Esq., Joshua Gillette, Esq., Kagen Caspersen & Bogart PLLC (Kagen defendants), Vincent E. Reilly, Esq., and Kinney Lisovicz Reilly & Wolff, PC (Reilly defendants) cross-appeal from a March 4, 2022 order denying their applications for sanctions. We affirm all orders on appeal.

The underlying matter giving rise to the appeal and cross-appeal emanates from a medical malpractice action. Patricia Grieco underwent a gastric banding procedure. Dr. Hans Schmidt, who was affiliated with Advanced Laparoscopic Associates, performed the surgery. Patricia Grieco suffered complications from the surgery and died a few days post-surgery.

The Estate of Patricia Grieco (Estate), through her husband Vincent Grieco (Grieco), retained Joseph E. Collini with the firm of Emole & Collini to file a complaint against Schmidt and Advanced Laparoscopic Associates for medical negligence (medical malpractice action). Collini engaged Dr. Lael Forbes through National Medical Consultants, P.C. (NMC) to serve as the Estate's expert in the medical malpractice action. A few weeks before the trial date, Dr. Forbes advised Collini that she applied for a job with Advanced Laparoscopic Associates and could no longer serve as the Estate's expert.

Based on this development, Collini asked to adjourn the trial so he could retain a new medical expert. The judge denied the request. Without a medical expert, the judge dismissed the medical malpractice action in September 2015. Collini did not file an appeal from that dismissal.

Four months after the dismissal of the medical malpractice action, Collini, on behalf of Grieco and the Estate, filed a new action in the Superior Court of New Jersey against NMC and Dr. Forbes (NMC action).¹ The Reilly defendants, representing NMC, removed the case to federal court. The Kagen defendants, representing Dr. Forbes, joined in the notice of removal.

¹ The NMC action included other named defendants associated with the medical group.

In federal court, the Kagen defendants filed a motion to disqualify Collini because his representation of the Estate made him potentially liable for damages in the NMC action and presented a conflict of interest under New Jersey's Rules of Professional Conduct (RPC) 1.7(a)(2) and 3.7(a). The federal court judge administratively dismissed the NMC action without prejudice and instructed the parties to exhaust all state court remedies in the Superior Court of New Jersey. The same day, August 5, 2016, Collini withdrew as counsel for the Estate. Thereafter, plaintiff represented the Estate.

Nearly one year after the dismissal of the medical malpractice action, plaintiff filed a motion to vacate the dismissal under Rule 4:50-1. The judge denied the motion and the Estate appealed. On appeal, we affirmed. Estate of Grieco v. Schmidt, No. A-0756-16 (App. Div. Jan. 29, 2018).

After exhausting all state court remedies, plaintiff refiled the NMC action in federal court. In a March 16, 2018 order, the federal court judge reopened the case, allowed defense counsel to file motions to disqualify plaintiff from representing the Estate, and stayed all other motion practice pending the outcome of the disqualification motions.

On April 13, 2018, the Kagen defendants filed a disqualification motion, citing a conflict of interest resulting from plaintiff's representation of both the

Estate and Collini.² They further asserted plaintiff failed to name Collini as a defendant in the NMC action and should have done so because Collini was potentially liable to the Estate for his mishandling of the medical malpractice action. The Reilly defendants joined in the disqualification motion.

After hearing argument on the disqualification motions in June 2018, the federal court judge entered a series of orders to further develop the record prior to ruling. In a July 2, 2018 order, the judge instructed plaintiff to submit a certification containing: "1) a list of any other matters in which plaintiff ha[d] served as counsel for [Collini] or his firm, including litigation, transactional, and/or any other legal matters; and 2) a description of any relationship he ha[d] with [] Collini and/or his firm in which he [did] not act as an attorney, whether social, familial, or otherwise."

Plaintiff submitted the required certification on July 5, 2018. In that certification, plaintiff stated Brazza Law, LLC represented Collini and his law firm in two matters unrelated to the medical malpractice action. However, he failed to provide specific information concerning those legal matters. Plaintiff

² The Kagen defendants claimed plaintiff represented Collini and his law firm in at least two matters, while simultaneously representing the Estate, presenting a conflict of interest.

further certified he was not currently representing Collini or his law firm, and had no familial or social relationship with Collini.

A week later, the federal court judge ordered plaintiff to submit a second certification, stating the "exact dates" of his representation of Collini and his law firm, and whether plaintiff represented Collini in any other matters.

In the second certification, plaintiff described the cases in which he represented Collini. Plaintiff stated one matter involved a claim that Collini and his law firm failed to properly record mortgages used to secure a loan. Plaintiff filed a lawsuit in the Superior Court of New Jersey against Collini's malpractice insurance carrier to obtain coverage for that claim. The other matter involved plaintiff filing an adversary proceeding in the bankruptcy court on behalf of Collini's law firm against a debtor seeking bankruptcy relief. However, plaintiff failed to provide the case captions and docket numbers for those legal matters. Plaintiff also neglected to include the dates of his representation.

After receiving the second certification, the federal court judge ordered plaintiff to submit yet a third certification to "have a final opportunity to comply with the [c]ourt's [o]rders and submit a certification that provides the information requested in the [c]ourt's prior [o]rder[s]." In a July 18, 2018 order, the judge required plaintiff to clarify his responses to her prior orders.

In his third certification, plaintiff explained his representation of Collini and his law firm in the insurance coverage litigation ended on June 22, 2017.³ As to his representation of Collini and his law firm in the bankruptcy matter, plaintiff certified his role "effectively" ended on June 22, 2017, but the matter did not officially conclude until December 27, 2017.⁴ Plaintiff also stated he made no court appearances in any matters on behalf of Collini or his law firm after June 2017.

After reviewing plaintiff's certifications in opposition to the disqualification motions, in a December 20, 2018 order, the federal court judge stated she was not satisfied the Estate received "full disclosure and consultation" about the "colorable and indeed obvious potential claim for legal malpractice against [] Collini that [plaintiff] has declined to pursue." The judge explained plaintiff never provided or referenced "any conflict waiver . . . obtained from [Grieco] and [] Collini for the purposes of complying with [the Rules of Professional Conduct]." The judge also noted Grieco's June 9, 2018 waiver

³ Plaintiff represented Collini and his law firm in a matter entitled Emolo & Collini v. Allied World Ins. Co., et al., Docket No. L-872-17.

⁴ Plaintiff represented Collini and his law firm in an adversary proceeding entitled In re Kersert Eucklid Morrison, Adversary Case No. 17-01269.

certification was submitted after the judge's order directing plaintiff to submit "any conflict waivers signed by [Grieco or the Estate]." She further indicated plaintiff never provided a conflict waiver signed by Collini.

Because the federal court judge lacked sufficient information to determine whether the Estate received full disclosure and consultation regarding waiver of the conflict, she appointed independent counsel to speak with Grieco about plaintiff's representation of the Estate in the NMC action. The judge selected Mark Olinsky, Esq., to confer with Grieco and to advise "of the potential conflicts inherent in [plaintiff]'s continued representation . . . in compliance with RPC 1.7(b)'s requirement of 'full disclosure.'" She ordered Olinsky to explain "the potential conflicts that exist in the current representation"; "the potential consequences of waiving those potential conflicts"; "assis[t] in preparing a conflict waiver that satisfies Rule 1.7 of the New Jersey Rules of Professional Conduct if, after full disclosure and consultation, Vincent Grieco wishes to waive the potential conflicts"; or "refer[] to the appropriate County Bar Association to seek substitute counsel if, after full disclosure and consultation, Vincent Grieco does not wish to waive the potential conflicts."

After Olinsky spoke with Grieco, the Estate terminated plaintiff's services in the NMC action. The Estate retained a new attorney to handle that matter.

Despite the Estate's termination of his legal services, plaintiff filed a motion for reconsideration of the December 20, 2018 order. The federal court judge entered an order striking plaintiff as counsel of record based on Grieco's "intention to retain new counsel" and administratively dismissing the reconsideration motion.

On July 29, 2021, the parties settled the NMC action. The record lacks information regarding the settlement amount, if any.

After the NMC action resolved, plaintiff filed an action against defendants in October 2021 in the Superior Court of New Jersey (state court action). In the state court action, plaintiff alleged defendants tortiously interfered with his business and "wrongfully induced [the Estate] to retain new counsel . . . based on [defendants'] factually inaccurate and defamatory allegations" in the NMC action.

The Kagen defendants served a written notice demanding plaintiff withdraw his complaint in the state court action under Rule 1:4-8 and N.J.S.A. 2A:15-59.1. The Reilly defendants served a similar notice.

In lieu of filing an answer in the state court action, defendants filed motions to dismiss for failure to state a claim under Rule 4:6-2(e). Plaintiff

opposed the motions. After hearing argument, the judge entered a January 21, 2022 order dismissing plaintiff's amended complaint with prejudice.⁵

The judge found plaintiff's claims were barred by the litigation privilege.

He stated:

The absolute[] immunity [under the litigation privilege] shields any communications made in a judicial or quasi-judicial proceeding by litigants or other participants authorized by law, and that would be attorneys, to achieve the objects of the litigation that have some connection or logical relation to the action. The privilege is absolute, and attorneys are wholly immune, even from statements which, unlike anything plaintiff alleges here, are actually defamatory statements.

He also concluded defendants' motions to disqualify plaintiff in the NMC action did not constitute an abuse of process or malicious prosecution and were barred by the doctrine of res judicata.

After the judge dismissed the state court action with prejudice, defendants moved for sanctions pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1. Defendants sought attorney's fees of approximately \$100,000.

In a March 4, 2022 order, the judge denied defendants' motions for sanctions against plaintiff. The judge found sanctions were inappropriate because plaintiff's conduct "[did] not rise to the level that would be required to

⁵ Plaintiff never served his amended complaint on defendants.

award counsel fees." Although plaintiff did not prevail on his claims against defendants, the judge determined plaintiff's complaint was not "motivated by any ill reasons or that it was for the purpose of some sort of punitive action."

Plaintiff appealed from the January 21, 2022 order and defendants cross-appealed from the March 4, 2022 order.

On appeal, plaintiff contends his claims were not barred by the litigation privilege. Further, even if the litigation privilege was applicable, he asserts defendants failed to satisfy the elements to invoke protection under the privilege. Additionally, plaintiff claims defendants' disqualification motions constituted an abuse of process and malicious use of process. Plaintiff also argues his claims were not barred by res judicata because the federal court judge never rendered a decision on defendants' disqualification motions in the NMC action.

In their cross-appeal, defendants argue the judge erred in denying their motion for sanctions. They claim the judge misapplied the standard for determining "bad faith" and did not consider plaintiff's lack of any legal basis for the claims asserted in the state court action.

We first consider plaintiff's appeal from the January 21, 2022 order dismissing his state court action with prejudice. Our review of a trial court's decision to dismiss a complaint for failure to state a claim under Rule 4:6-2(e)

is de novo. Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019). We "owe[] no deference to the trial court's legal conclusions." Ibid. Our review "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). "[I]f the complaint states no basis for relief and discovery would not provide one, dismissal is the appropriate remedy." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005).

Plaintiff argues the judge erred in dismissing his claims against defendants based on the litigation privilege. Specifically, plaintiff contends defendants failed to satisfy the third and fourth prongs of the litigation privilege. We disagree.

The litigation privilege provides absolute immunity from civil liability to attorneys for statements made during judicial or quasi-judicial proceedings. Loigman v. Twp. Comm. of Twp. of Middletown, 185 N.J. 566, 579 (2009). To be protected by the privilege, the statement must be "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) . . . have some connection or logical relation to the action." Hawkins v. Harris, 141 N.J. 207, 216 (1995). "An absolute privilege may be extended to statements made in the course of a

judicial proceeding even if the words are written or spoken maliciously, without any justification or excuse, and from personal ill will or anger against the party defamed." DeVivo v. Ascher, 228 N.J. Super. 453, 457 (App. Div. 1988). Even "defamatory" statements are immune from liability if "made in the course of judicial, administrative, or legislative proceedings." Hawkins, 141 N.J. at 213 (quoting Erickson, 117 N.J. at 563). The privilege was conceived to ensure attorneys are "free to pursue the best course charted for their clients without the distraction of a vindictive lawsuit looming on the horizon." Loigman, 185 N.J. at 587-88.

Contrary to plaintiff's argument, defendants' statements in support of their disqualification motions in the NMC action were absolutely immune under the litigation privilege.

We first consider whether defendants' statement in the NMC action achieved the objects of that litigation. Defendants' purported wrongful conduct in the NMC action consisted of filing two briefs and presenting oral argument to the federal court judge. The briefs and arguments sought to achieve a legitimate objective in the NMC action—specifically, plaintiff's disqualification from continued representation of the Estate based on a conflict of interest.

Plaintiff's representation of Grieco and the Estate began in September 2016. He continued representing Grieco and the Estate until December 2018, when Grieco decided to retain a new attorney for the Estate in the NMC action. In 2017, while he represented the Estate, plaintiff also represented Collini and his law firm in two separate litigations. Plaintiff's representation of Grieco and the Estate clearly overlapped with plaintiff's representation of Collini and Collini's law firm, presenting a conflict of interest. It was plaintiff's simultaneous representation of parties with adverse interests that prompted defendants' filing of the disqualification motions in a "search for the truth" in a judicial proceeding. It is axiomatic that a search for the truth is a legitimate object of litigation and satisfied the third prong of the litigation privilege.

Under the fourth prong of the litigation privilege, defendants' statements were logically connected and related to the NMC action. Defendants sought to avoid the assessment of damages against their clients by holding the party responsible for the Estate's damages, if any, accountable. Defendants asserted Collini and his law firm mishandled the medical malpractice action and, therefore, were responsible for damages in the NMC action. Defendants had the legal right and ethical obligation to advocate on behalf of their clients by seeking to disqualify plaintiff in the NMC action based on plaintiff's conflict of interest,

satisfying the connection or logical relation component under the fourth prong of the litigation privilege.

Having satisfied all four prongs of the litigation privilege, the judge correctly concluded plaintiff's claims against defendants in the state court action were barred. Because we are satisfied the judge properly dismissed plaintiff's claims based on the litigation privilege, we need not address whether the judge erred in concluding res judicata, collateral estoppel, and the entire controversy doctrine precluded plaintiff's claims as a matter of law.

We next consider defendants' cross-appeal. Defendants contend the judge erred in denying their post-judgment application for sanctions under N.J.S.A. 2A:15-59.1 and Rule 1:4-8. We disagree.

We review an order denying a motion for sanctions for abuse of discretion and will reverse "only if it 'was not premised upon consideration of all relevant factors, was based upon consideration of irrelevant or inappropriate factors, or amounts to a clear error in judgment.'" McDaniel v. Man Wai Lee, 419 N.J. Super. 482, 498 (App. Div. 2011) (quoting Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005)). "The rule and statute must both be interpreted strictly against the applicant for an award of fees." Tagayun v. AmeriChoice of N.J., Inc., 446 N.J. Super. 570, 579 (App. Div. 2016).

New Jersey courts are empowered to sanction individuals who knowingly file baseless litigation. See Toll Bros., Inc. v. Twp. of W. Windsor, 190 N.J. 61, 67 (2007). N.J.S.A. 2A:15-59.1 governs "[a]n award of fees against a party, as opposed to a lawyer or a self-represented litigant." Tagayun, 446 N.J. Super. at 578. A court must find a claim "was either pursued 'in bad faith, solely for the purpose of harassment, delay or malicious injury' or that the non-prevailing party knew or should have known it '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." Ibid. (quoting N.J.S.A. 2A:15-59.1(b)(1)-(2)).

Rule 1:4-8 allows courts to impose sanctions where an attorney files a pleading that is not warranted under existing law or fails to seek an extension, modification, or reversal of existing law. Bove v. AkPharma Inc., 460 N.J. Super. 123, 151 (App. Div. 2019). "For purposes of imposing sanctions under Rule 1:4-8, an assertion is deemed 'frivolous' when 'no rational argument can be advanced in its support, or it is not supported by credible evidence, or it is completely untenable.'" Id. at 148 (quoting United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 389 (App. Div. 2009)).

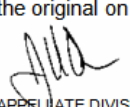
Here, as the trial judge explained, to warrant the imposition of sanctions, "[t]he claim needs to be without reasonable basis in law or equity." The judge declined to find that plaintiff asserted claims lacking any legal basis and denied defendants' motions.

Having reviewed the record, we are satisfied the judge properly found plaintiff's conduct did "not rise to the level that would be required to award counsel fees." While plaintiff's arguments were ultimately unsuccessful, defendants failed to demonstrate plaintiff's claims were filed in bad faith or without reasonable basis in law or equity. "Sanctions for frivolous litigation are not imposed because a party is wrong about the law and loses his or her case. . . . The term frivolous should not be employed broadly or it could limit access to the court system." Tagayun, 446 N.J. Super. at 580 (citing First Atl. Fed. Credit Union v. Perez, 391 N.J. Super. 419, 432-33 (2007)).

To the extent we have not addressed the parties' remaining arguments, we conclude those arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed as to the appeal and cross-appeal.

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


CLERK OF THE APPELLATE DIVISION