

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2218-22

M.M.,

Plaintiff-Appellant,

v.

ATLANTIC HEALTH SYSTEM,
INC., OVERLOOK MEDICAL
CENTER, MEDKEY LLC, RWJ
BARNABAS HEALTH, INC.,
SAINT BARNABAS MEDICAL
CENTER, MICHAEL TYSHKOV,
MARIA TYSHKOV, ALLA
GORDINA, M.D., NORTHWELL
HEALTH, INC., STATEN
ISLAND UNIVERSITY
HOSPITAL, and PHYSICIANS
OF UNIVERSITY HOSPITAL, P.C.,

Defendants-Respondents.

Argued May 23, 2023 – Decided August 30, 2023

Before Judges Gilson, Rose, and Gummer.

On appeal from an interlocutory order of the Superior
Court of New Jersey, Law Division, Essex County,
Docket No. L-5687-21.

Michael S. Misher (Zarwin, Baum, Devito, Kaplan, Schaer, Toddy, PC) of the Pennsylvania bar, admitted pro hac vice, argued the cause for appellant (Zarwin, Baum, Devito, Kaplan, Schaer, Toddy, PC, attorneys; Jay M. Leffler and Scott Zlotnick, on the brief).

Gary L. Riveles argued the cause for respondent Alla Gordina, M.D. (MacNeill, O'Neill, Riveles & Spitzer, LLC, attorneys; Anelia Dikovytska Brown, on the brief).

PER CURIAM

Plaintiff M.M. alleged defendant Alla Gordina, M.D., "possessed information that would reasonably make her believe" defendant Michael Tyshkov (Tyshkov), a pediatric gastroenterologist, "was being inappropriate with and/or assaulting his female patients."¹ Plaintiff asserted Gordina was negligent in failing to report Tyshkov to the Division of Child Protection and Permanency (DCPP) pursuant to N.J.S.A. 9:6-8.10. With our permission, plaintiff appeals from a November 30, 2022 order granting Gordina's motion to dismiss the claim against her based on plaintiff's failure to provide an affidavit of merit pursuant to the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 to -29. Because the motion judge erred in finding plaintiff was required to provide an

¹ We use plaintiff's initials given her allegations against Tyshkov and his subsequent convictions. See R. 1:38-3(c)(9).

affidavit of merit regarding her failure-to-report claim against Gordina, we reverse and remand.

I.

On July 21, 2021, plaintiff filed a complaint against defendants Tyshkov, Maria Tyshkov, Medkey LLC, Atlantic Health System, Inc., Overlook Medical Center, RWJ Barnabas Health, Inc., and Saint Barnabas Medical Center. She alleged Tyshkov, who began to treat plaintiff in 2007 when she was nine-years old, had sexually assaulted her when she was eighteen-years old during an April 2016 examination and on several other occasions. According to plaintiff, Tyshkov was arrested on March 29, 2019, and pleaded guilty to two counts of fourth-degree criminal sexual contact and one count of endangering the welfare of a minor on December 3, 2020.

On February 9, 2022, plaintiff amended her complaint, naming Gordina as a defendant. In count VIII, entitled "NEGLIGENCE AND GROSS NEGLIGENCE," plaintiff alleged Gordina had possessed information in late 2017 or early 2018 "that would reasonably make her believe . . . Tyshkov was being inappropriate and/or assaulting his female patients." Plaintiff asserted Gordina had failed to fulfill a mandatory duty under N.J.S.A. 9:6-8.10 to report Tyshkov's misconduct to DCPD. Plaintiff subsequently filed another amended

complaint, naming additional defendants. Gordina filed an answer, demanding plaintiff provide an affidavit of merit, and subsequently moved to dismiss, with prejudice, plaintiff's claim against her based on plaintiff's failure to provide an affidavit of merit.

In opposition to the motion, plaintiff submitted her counsel's certification, in which he asserted plaintiff had learned about Gordina's knowledge of Tyshkov's actions after the prosecutor's office provided him with the non-privileged portion of its criminal investigation file regarding Tyshkov. According to plaintiff's counsel, after Tyshkov's arrest, two other people came forward, alleging he had sexually assaulted them during gastroenterological examinations. Plaintiff's counsel certified that the mother of one of the other alleged victims had informed investigators that she told Gordina, who was her child's pediatrician, Tyshkov had looked down her child's pants without another adult present. That mother allegedly asked Gordina, "if it was normal that Dr. Tyshkov was looking at [her] private parts without a nurse present." Gordina allegedly responded that "it was normal," but the patient had the right to refuse the examination. Plaintiff's counsel stated the mother had told investigators that about ten minutes after that conversation ended, Tyshkov called her, told her Gordina had told him about their conversation, and said he understood her

concerns. Gordina purportedly told police: the mother had expressed concern Tyshkov had seen her child alone; Gordina responded that seeing the child alone was "weird"; and Gordina told the mother she would reach out to Tyshkov. Gordina also allegedly told police Tyshkov had informed her he did not have someone else in the room with him when he conducted the examination because he was short-staffed.

After hearing argument on November 30, 2022, the motion judge placed a decision on the record granting the motion based on her conclusion plaintiff was required to provide an affidavit of merit regarding her failure-to-report claim against Gordina. The motion judge found, "[t]his is a situation where . . . the fact finder has to know what the standard of care is." The judge also said she did not "see a separate cause of action for a failure to report." The judge issued an order granting the motion to dismiss "for failure to provide an [a]ffidavit of [m]erit."

In an order dated January 31, 2023, the judge denied plaintiff's reconsideration motion. In an attached statement of reasons, the judge held:

Since [p]laintiff has alleged personal injuries a properly qualified medical expert must opine as to the standard of care applicable to Dr. Gordina with respect to her duty if any, under N.J.S.A. 9:6-8.10. The Affidavit of Merit [Statute] is applicable to claims of negligence such as the claims asserted [against Gordina] in . . .

[p]laintiff's [a]mended [c]omplaint. A qualified expert would have to opine on whether receiving information from a pediatric patient's parent regarding another medical provider's failure to utilize a chaperone during a physical examination would trigger the reporting requirement of N.J.S.A. 9:6-8.10.

The judge also stated "N.J.S.A. 9:6-8.10 does not establish an independent cause of action."

On leave granted, plaintiff contends no doctor-patient relationship existed between plaintiff and Gordina; thus, plaintiff cannot and did not assert a medical-negligence claim against Gordina and was not required to provide an affidavit of merit regarding the "simple negligence" claim against her. Plaintiff also argues the judge erred in finding no civil cause of action exists under N.J.S.A. 9:6-8.10.

In response, Gordina argues the judge correctly found plaintiff was required to provide an affidavit of merit regarding her claim against Gordina because plaintiff sought damages for personal injuries allegedly caused by the negligence of a licensed physician. Gordina contends plaintiff's allegations require proof Gordina deviated from the applicable standard of care. Gordina also asserts plaintiff cannot sue Gordina in an "individual capacity" under N.J.S.A. 9:6-8.10 because the language of the statute does not expressly create a civil cause of action. Further, Gordina argues she did not owe any duty of care

to plaintiff given that, as plaintiff concedes, she and plaintiff had no doctor-patient relationship.

II.

We review de novo orders on motions to dismiss based on a failure to comply with the Affidavit of Merit Statute, Hoover v. Wetzler, 472 N.J. Super. 230, 235 (App. Div. 2022), in part because they involve a legal determination, specifically "the statutory interpretation issue of whether a cause of action is exempt from the affidavit of merit requirement," Cowley v. Virtua Health Sys., 242 N.J. 1, 14-15 (2020), and in part because they involve a dismissal of a complaint for failure to state a claim. "The submission of an appropriate affidavit of merit is considered an element of the claim." Meehan v. Antonellis, 226 N.J. 216, 228 (2016); see also N.J.S.A. 2A:53A-29. Thus, "[f]ailure to submit an appropriate affidavit ordinarily requires dismissal of the complaint with prejudice." Ibid.; see also Cowley, 242 N.J. at 16 (noting our Supreme Court has construed the Affidavit of Merit Statute "to require dismissal with prejudice for noncompliance").

The Affidavit of Merit Statute requires:

In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff

shall, within [sixty] days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices.

[N.J.S.A. 2A:53A-27.]

A "licensed person" includes a "physician in the practice of medicine or surgery." N.J.S.A. 2A:53A-26(f). Plaintiff does not dispute Gordina falls within that definition. Instead, plaintiff contends she is suing Gordina in her personal, not professional, capacity.

Not every claim against a licensed person requires an affidavit of merit. "[A]n affidavit will only be needed when the underlying harmful conduct involves professional negligence, implicating the standards of care within that profession." McCormick v. State, 446 N.J. Super. 603, 613-14 (App. Div. 2016). In deciding whether a plaintiff must submit an affidavit of merit, courts must look deeper than how parties designate their cases. "It is not the label placed on the action that is pivotal but the nature of the legal inquiry." Couri v. Gardner, 173 N.J. 328, 340 (2002). Instead of focusing on a label, "courts should determine if the claim's underlying factual allegations require proof of a

deviation from the professional standard of care applicable to that specific profession." Ibid. If that proof is necessary, "an affidavit of merit is required for that claim, unless some exception applies." Ibid.

Informed by those principles, we turn to the limited question presented in this appeal: whether an affidavit of merit must be served on a defendant, who as a physician is a "licensed person" within the meaning of the Affidavit of Merit Statute, to support a negligence claim based on a failure to report suspected child abuse pursuant to N.J.S.A. 9:6-8.10. Because the alleged underlying harmful conduct – the failure to report suspected child abuse under N.J.S.A. 9:6-8.10 – does not implicate the standards of care within Gordina's profession, see McCormick, 446 N.J. Super. at 613-14, we hold the motion judge erred in concluding plaintiff was required to provide an affidavit of merit regarding her claim against Gordina. Accordingly, we reverse the order dismissing plaintiff's claim against Gordina and remand this matter for further proceedings.

In L.A. v. New Jersey Division of Youth and Family Services, a case involving an emergency-room physician's alleged failure to report suspected abuse of his pediatric patient, our Supreme Court held:

N.J.S.A. 9:6-8.10 provides the long-standing standard for the reporting of suspected child abuse: "Any person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall

report the same immediately" to the State. If reasonable cause exists to believe that child abuse has occurred, a statutory duty to report arises. See N.J.S.A. 9:6-8.14 (making violation of duty punishable as disorderly person offense).

[217 N.J. 311, 316 (2014).]

The Court held the "reasonable cause to believe" standard of care under N.J.S.A. 9:6-8.10 applies to "all persons who come into contact with children who may be victims of child abuse" and expressly rejected "the argument that a variation to N.J.S.A. 9:6-8.10's standard should apply to doctors." Id. at 328-30. The Court "discern[ed] in N.J.S.A. 9:6-8.10 a legislative intent to impose a universal obligation to report child abuse whenever a person forms a reasonable belief that a child has been subjected to child abuse." Id. at 316; see also N.E. for J.V. v. State Dep't of Child. & Fams., Div. of Youth & Fam. Servs., 449 N.J. Super. 379, 394 n.7 (App. Div. 2017).

Thus, the standard of care under N.J.S.A. 9:6-8.10 is not specific to a profession; it applies to "all persons." L.A., 217 N.J. at 330. And the failure to report under that standard of care is not an "act of . . . negligence . . . carried out by a licensed person in the course of practicing the person's profession" but is an act of negligence for failing to fulfill a duty that applies to all. Haviland v. Lourdes Med. Ctr. of Burlington Cnty., Inc., 250 N.J. 368, 382 (2022) (finding

the affidavit-of-merit requirement applies only when the defendant committed the alleged act of negligence while practicing his or her profession).

In granting Gordina's motion, the judge found "the fact finder has to know what the standard of care is." More fully explaining her reasoning in denying plaintiff's reconsideration motion, the judge held "a properly qualified medical expert must opine as to the standard of care applicable to Dr. Gordina with respect to her duty, if any, under N.J.S.A. 9:6-8.10." However, L.A. makes clear what standard of care is set forth in N.J.S.A. 9:6-8.10 – "[i]f reasonable cause exists to believe that child abuse has occurred, a statutory duty to report arises" – and that that standard of care applies to everyone, regardless of profession. L.A., 217 N.J. at 316, 330. The judge erred in finding "a properly qualified medical expert" must "opine as to the standard of care applicable to Dr. Gordina with respect to her duty, if any, under N.J.S.A. 9:6-8.10" and because of that purported need for an expert on a standard of care specific to Gordina, plaintiff was required to provide an affidavit of merit. Accordingly, we reverse the dismissal of the claim against Gordina based on the failure to provide an affidavit of merit and remand for proceedings consistent with this opinion.

Our reversal is limited to that single issue involving the affidavit-of-merit requirement, which was the basis of the dismissal of plaintiff's claim against

Gordina. We express no opinion as to whether plaintiff has a viable civil right of action against Gordina based on her purported failure to report Tyshkov pursuant to N.J.S.A. 9:6-8.10. We recognize the judge in her decision on the motion to dismiss stated she did not "see a separate cause of action for a failure to report" and in her statement of reasons denying the reconsideration motion stated, "N.J.S.A. 9:6-8.10 does not establish an independent cause of action." However, those "[n]aked conclusions" about whether an independent cause of action exists under N.J.S.A. 9:6-8.10 "do not satisfy the purpose of [Rule] 1:7-4." Romero v. Gold Star Distrib., LLC, 468 N.J. Super. 274, 304 (App. Div. 2021) (alteration in the original) (quoting Giarusso v. Giarusso, 455 N.J. Super. 42, 54 (App. Div. 2018). "Meaningful appellate review is inhibited unless the judge sets forth the reasons for his or her opinion." Ibid. (quoting Giarusso, 455 N.J. Super. at 54)). Moreover, in the dismissal order, the judge expressly stated she was granting the motion "for failure to provide an [a]ffidavit of [m]erit."

We also do not express an opinion about other issues not raised in this appeal, including whether Gordina was required to report Tyshkov based on the standard set forth in N.J.S.A. 9:6-8.10, whether she had a duty to this plaintiff to report Tyshkov, what evidence would be required to prove she had a duty to

this plaintiff to report him and failed in that duty, and whether any such failure proximately caused plaintiff damages.

Reversed and remanded for proceedings consistent with this opinion. 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