# RECORD IMPOUNDED



SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2754-21
A-3318-21

JANE DOE, whose initials are N.K.,

Plaintiff-Appellant,

v.

JOHN ROE, whose initials are S.M.,

Defendant-Respondent.

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Argued February 13, 2023 – Decided March 17, 2023

Before Judges Whipple, Smith and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-7050-19.

Paige R. Butler argued the cause for appellant (Law Offices Rosemarie Arnold, attorneys; William R. Stoltz and Paige R. Butler, on the briefs).

Matthew J. Ross argued the cause for respondent (Mueller Law Group, attorneys; Gregory K. Mueller and Matthew J. Ross, on the brief).

PER CURIAM

Plaintiff appeals the trial court's June 3, 2022, grant of summary judgment dismissing her complaint against defendant for negligently infecting her with a sexually transmitted disease. Plaintiff also appeals the trial court's June 3, 2022, award of sanctions against her for violation of N.J.S.A. 2A:15-59.1(a)(1). We affirm as to the order granting summary judgment in favor of defendant and remand as to the sanctions award.

I.

Plaintiff alleges defendant, her former romantic partner, caused her to contract human papillomavirus (HPV). Plaintiff began a sexual relationship with defendant in 2018.[1]

Plaintiff was married between 1982 and 1993. During that period, her then husband had an affair with another woman. Plaintiff's husband continued to have unprotected sex with her during the affair, and he was never tested for any sexually transmitted diseases during their marriage.

[1] The record shows that plaintiff provided conflicting dates for when the relationship started. She testified at her deposition that the relationship began in February 2018, but, in opposition to defendant's motion for summary judgment, she submitted a certification establishing May 2018 as the month for commencement of their sexual relationship.

After her divorce, plaintiff engaged in a sexual relationship with a male co-worker two to four times a month between 2007 and 2012. Plaintiff used condoms when having sex with the male co-worker. The record further shows that after plaintiff's sexual relationship with her co-worker ended, defendant was the next person plaintiff had sex with, beginning in 2018.

Beginning in April 2018, plaintiff underwent a series of pap smears, five in ten months. Her pap smear tests yielded negative results for HPV on April 6, 2018, and October 11, 2018. The final three tests, taken on November 16 and December 18, 2018, and February 12, 2019, were positive for HPV.

In October 2019, plaintiff filed a complaint against defendant alleging negligence and negligent or intentional infliction of emotional distress.

On December 20, 2019, two months after plaintiff's negligent transmission complaint was filed, defendant sent plaintiff the first of two frivolous litigation notices pursuant to Rule 1:4-8 and N.J.S.A. 2A:15-59.1(a)(1), demanding she withdraw the complaint within twenty-eight days. The notice posed several arguments: defendant had never been diagnosed with HPV; defendant had never knowingly been in sexual contact with anyone diagnosed with HPV; there is no diagnostic HPV test for men, so defendant could not have known if he was a carrier; there is no way to determine how long a person has

had HPV; and there is no way to determine who infected whom. Plaintiff did not withdraw the complaint.

On August 12, 2020, the trial court granted defendant's motion impounding the record in this matter, deleting the complaint from eCourts, directing plaintiff to file an amended complaint, making the parties' names anonymous, and directing litigants to make all future filings with the court via paper only. Plaintiff filed an amended complaint.

At the completion of discovery, defendant sent plaintiff a second "frivolous litigation letter" advising plaintiff she had offered no evidence supporting her claims. Defendant also referenced alleged misrepresentations by plaintiff throughout the case, highlighted the lack of a diagnostic test for males with HPV, and pointed out plaintiff had not produced an expert. He demanded she withdraw the amended complaint within twenty-eight days. Plaintiff failed to do so.

Defendant moved for summary judgment, making two arguments: plaintiff failed to submit proofs defendant had HPV or had reason to suspect he was infected with HPV; and plaintiff presented no expert witness to support her claims or to refute defendant's expert's opinion regarding transmission. Without such proof, defendant argued, plaintiff failed to prove causation. The trial court

made its findings and concluded plaintiff did not present expert evidence as to the origin and causation of her HPV, failed to raise genuine issues of material fact showing defendant had HPV, and breached his duty of care by not informing her. The trial court relied on our decision in Earle v. Kulko, which held that "in order to show negligence in exposing another to a contagious or infectious disease, it must be proved that the defendant knew of the presence of the disease." 26 N.J. Super. 471, 475 (App. Div. 1953).

The trial court found plaintiff improperly manufactured a factual issue by contradicting her deposition testimony that her sexual relationship with defendant began in February 2018 with a certification in opposition to summary judgment claiming that her sexual relationship with defendant did not start until May 2018. The trial court found nothing in the record to support this change of date. Applying the sham affidavit doctrine, the trial court rejected the plaintiff's factual dispute for purposes of summary judgment.

The trial court noted defendant's expert opined that it is possible for an HPV infection to lay dormant for years, and that the expert also noted reported cases of non-sexual transmission. In light of the defense expert's opinion, the court concluded plaintiff required an expert to explain how she contracted HPV. Without expert testimony on the question of causation, the trial court found

plaintiff's allegations were unsupportable. The court granted defendant's motion for summary judgment. A separate court subsequently awarded sanctions against plaintiff and her counsel for maintaining a frivolous civil action, pursuant to N.J.S.A. 2A:15-59.1(a)(1).

Plaintiff appealed, arguing the trial court erred when it: rejected plaintiff's affidavit in opposition to summary judgment as a sham; concluded plaintiff required an expert on the issue of causation; awarded frivolous lawsuit sanctions without providing plaintiff opportunity to oppose them; and failed to provide a statement of reasons for the award.

II.

In reviewing the grant or denial of summary judgment, the standard of review is de novo. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016) (citing Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012)). We employ the same standard as the trial court. Ibid. The trial court first determines whether there was a genuine issue of fact. If not, this court is required to "decide whether the trial court correctly interpreted the law." DepoLink Court Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citation omitted); see also Bhagat v. Bhagat, 217 N.J. 22, 38 (2014) ("[T]his [c]ourt must

review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law.").

III.

A.

Plaintiff argues her subsequent affidavit was intended to clarify the dates and is not a contradiction of her prior testimony. She argues the trial court erred by applying the sham affidavit doctrine to disregard her sworn statement that her sexual relationship with defendant did not begin until May 2018. We are not persuaded.

The principles behind the sham affidavit doctrine are clearly defined in Metro Mktg., LLC v. Nationwide Vehicle Assurance, Inc., 472 N.J. Super. 132 (App. Div. 2022).

> The sham affidavit doctrine grows out of our courts' summary judgment jurisprudence. Pursuant to that doctrine, judges who rule on summary judgment motions are not bound to consider "a purely self-serving certification" by a party "that directly contradicts his [or her] prior representations in an effort to create an issue of fact."
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> As the Supreme Court instructed in its seminal opinion in Shelcusky [Shelcusky v. Garjuilo, 172 N.J. 185 (2002)], such a purported factual dispute based on a purely self-serving motion affidavit or certification

> may be "perceived as a sham" and, to that extent, should "not [constitute] an impediment to a grant of summary judgment." The Court observed it "would greatly diminish the utility of summary judgment," if a "party who ha[d] been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony."
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> . . . .
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> The very object of the summary judgment procedure . . . is to separate real issues from issues about which there is no serious dispute. Sham facts should not subject a defendant to the burden of a trial. The determination that an offsetting affidavit creates only a sham factual dispute is squarely within the trial court's authority at the summary judgment stage, when the court is required to evaluate, analyze, and sift evidence to determine whether the evidential materials, when viewed in the light most favorable to the opposing party, would permit a rational factfinder to resolve the issue in favor of the opposing party. That rule does not intrude on the function of the jury because it does not require the trial court to determine credibility, or to determine the relative weight of conflicting evidence.
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> [Id. at 148-49 (citations omitted).]

A court may disregard an affidavit when it (1) "contradict[s] patently and sharply the earlier deposition testimony," (2) the contradiction is not "reasonably explained" and (3) where there was no "confusion or lack of clarity." Shelcusky, 172 N.J. at 201-02.

The record shows plaintiff had been consistent about the start of her sexual relationship with defendant. Plaintiff's complaint states "[f]rom in or about February 11, 2018[,] through May 2019, [p]laintiff Jane Doe, whose initials are N.K., and [d]efendant . . . had an intimate sexual relationship." In her response to defendant's request for admissions, plaintiff admitted "that [she] had not had sexual relations with anyone between 2008 and the time she engaged in a sexual relationship with [d]efendant in or about February 2018." In her answers to interrogatories, plaintiff stated "[f]rom . . . about February 11, 2018 through May 2019, I was engaged in an intimate sexual relationship with [d]efendant . . . ."

In her deposition, plaintiff confirmed the February 11, 2018 date. She also confirmed that she had not had sexual relation with anyone between 2008 and the time she began a sexual relationship with defendant in February 2018.

The record poses a sharp contrast between plaintiff's certification in opposition to summary judgment and her earlier responses to discovery. Plaintiff offers no reasonable explanation for the change regarding the February 2018 start to her sexual relationship with defendant. Nor does plaintiff offer evidence that there was "confusion or lack of clarity" in the record. Indeed, the record shows plaintiff never claimed her sexual relationship began in May 2018

prior to her summary judgment opposition. We find no error in the trial court's conclusion that the sham affidavit doctrine applied to plaintiff's statement about when her sexual relationship began with defendant.

B.

Plaintiff next argues that the trial court erred by finding plaintiff required an expert witness to prove causation. She contends that causation, on these facts, is an issue for the jury. We note plaintiff cites no precedent for the principle that an expert report is not required to prove a claim of negligent transmission of a sexually transmitted infection.

"The necessity of expert testimony is determined by the sound exercise of discretion by the trial judge." Maison v. N.J. Transit Corp., 460 N.J. Super. 222, 231 (App. Div. 2019) (citing State v. Summers, 350 N.J. 353, 364 (App. Div. 2002)). Expert testimony is required when a subject is "so esoteric that jurors of common knowledge and experience cannot form a valid conclusion." Wyatt ex rel. Caldwell v. Wyatt, 217 N.J. Super. 580, 591 (App. Div. 1987) (citing Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982)).

The record shows defendant's expert identified alternative explanations for the origins of plaintiff's HPV. According to the expert: HPV can lay dormant in a person for years and appear during times of stress; also, it can be

contracted through non-sexual transmission. On its face, the spread of HPV, an infectious disease, does not fall within the common knowledge doctrine. The record shows that there are unique issues associated with diagnostic testing for HPV, including the fact that there is no HPV test for men.

Plaintiff raises public policy concerns related to the lack of verifiable HPV testing for men. The absence of such testing, in our view, does not preclude a person from succeeding on a negligent transmission case against a man. A male defendant could still be found liable for negligent transmission if the proofs showed he had HPV symptoms, or that he possessed knowledge he was infected. A properly qualified expert could have provided testimony to a reasonable degree of probability concerning likely causes of plaintiff's infection. A plaintiff could present such an expert to rebut defendant's alternate infection theories. We conclude it was well within the sound discretion of the trial court to require plaintiff to produce an expert on causation.

C.

Plaintiff argues she did not need an expert on causation because circumstantial evidence was enough to defeat summary judgment. She contends the fact that she had no sexual intercourse between 2008 and 2018, along with her 2018 timeline of negative to positive HPV tests, were facts sufficient to

establish causation and defeat summary judgment. We are not persuaded, and we find the argument without merit. See R. 2:11-3(e)(1)(E). We briefly comment.

In addition to failing to produce an expert on medical causation, plaintiff failed to present any evidence that defendant knew he had HPV. Plaintiff also did not produce any evidence defendant had any symptoms of HPV, even after accessing defendant's medical records. We find no error by the trial court in granting summary judgment pursuant to the Kulko standard.

IV.

Plaintiff next challenges the award of sanctions, made by a different judge. "In reviewing the award of sanctions pursuant to R. 1:4-8, we apply an abuse of discretion standard[,]" United Hearts, L.L.C. v. Zahabian, 407 N.J. Super. 379, 390 (App. Div. 2009), and we will only reverse an award 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." Masone v. Levine, 382 N.J. Super. 181, 193 (App. Div. 2005) (citing Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)).

Rule 1:4-8 and the frivolous litigation statute, N.J.S.A. 2A:15-59.1, authorize sanctions, including reasonable attorney's fees, against any party. The

statute states a prevailing 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 ... of the nonprevailing person was frivolous." N.J.S.A. 2A:15-59.1(a)(1). In order to find a complaint frivolous:

> [T]he judge shall find on the basis of the pleadings, discovery, or the evidence presented that either: (1) The complaint . . .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 . . . 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.
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> [N.J.S.A. 2A:15-59.1(b).]

"[A]n assertion is deemed 'frivolous' when 'no rational argument can be advanced in its support, or it is not supported by any credible evidence, or it is completely untenable.'" Zahabian, 407 N.J. Super. at 389. The "continued prosecution of a claim or defense may, based on facts coming to be known to the party after the filing of the initial pleading, be sanctionable as baseless or frivolous even if the initial assertion of the claim or defense was not." Iannone v. McHale, 245 N.J. Super. 17, 31 (App. Div. 1990).

The sanctions judge, in a very short written statement of reasons, found plaintiff and her counsel failed to act in good faith throughout the litigation. The court noted that Kulko required plaintiff to present evidence that defendant knew he was infected with HPV at the time they had sexual relations. The judge found plaintiff maintained her complaint despite being shown in the frivolous litigation notices that the applicable law and evidence precluded her from maintaining the cause of action in good faith.

The judge concluded: plaintiff's counsel failed to conduct a reasonable inquiry as to plaintiff's allegations pursuant to Rule 1:4-8(a); plaintiff alleged without any basis in fact that defendant knew he had HPV and then infected plaintiff; and plaintiff and her counsel failed to act in good faith when serving the complaint on defendant's minor son. There was sufficient evidence in the record to support the findings of the sanctions judge and we discern no abuse of discretion.

The judge next found defendant incurred a total of $48,553.30 in attorney fees and $1,326.16 in costs and expenses. The court wrote:

> [g]iving plaintiff some belief in her good faith this [c]ourt declines to sanction for that amount. However, the [c]ourt also notes that [d]efendant's attorney fees of $20,500 and $192.71 in costs and expenses were needlessly incurred as a result of plaintiff's maintain[ance of] this specious action [beginning] . . .

> twenty-eight days after the second "frivolous litigation letter." The [c]ourt has reviewed the Certification of Services and finds these fees and costs are fair and reasonable based on all the factors enumerated in Rule 4:42-8 for costs, Rule 4:42-9 for attorney's fees, and Rendine v. Pantzer, 141 N.J. 292 (1995).
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> [(emphasis added).]

Without further explanation, the judge issued an order dated June 3, 2022, granting defendant's motion for counsel fees and costs in the amount of $20,500 in attorney's fees and $192.71 in costs and expenses. While the judge referred to the Rules of Court, as well as caselaw, in finding the sanctions award "fair and reasonable," neither the order nor the written statement of reasons contained a lodestar analysis.

In calculating the amount of reasonable attorney's fees, "an affidavit of services addressing the factors enumerated by RPC 1.5(a)" is required. R. 4:42-9(b).

RPC 1.5(a) sets forth the factors to be considered:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
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> > (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
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> (8) whether the fee is fixed or contingent.

A court awarding attorney's fees must first determine the "lodestar," defined as the "number of hours reasonably expended" by the attorney, "multiplied by a reasonable hourly rate." Litton Indus., Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009) (citing Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 21 (2004)). "The court must not include excessive and unnecessary hours spent on the case in calculating the lodestar." Furst, 182 N.J. at 22 (citing Rendine, 141 N.J. at 335-36).

"The amount of attorney fees usually rests within the discretion of the trial judge, but the reasons for the exercising of that discretion should be clearly stated." Khoudary v. Salem Cnty. Bd. of Soc. Servs., 281 N.J. Super. 571, 578 (App. Div. 1995) (citations omitted); see also R. 1:7-4(a) (requiring a court to "find the facts and state its conclusions of law thereon in all actions tried without a jury, on every motion decided by a written order that is appealable as of right, and also as required by [Rule] 3:29").

"[T]he court must specifically review counsel's affidavit of services under [Rule] 4:42-9, and make specific findings regarding the reasonableness of the legal services performed . . . ." F.S. v. L.D., 362 N.J. Super. 161, 170 (App. Div. 2003). "Without such findings it is impossible for an appellate court to perform its function of deciding whether the determination below is supported by substantial credible proof on the whole record." Monte v. Monte, 212 N.J. Super. 557, 565 (App. Div. 1986). "The trial judge may satisfy the court rules by relying on the facts or reasons advanced by a party; however, the court is obligated to make the fact of such reliance 'explicit.'" Allstate Ins. Co. v. Fisher, 408 N.J. Super. 289, 301 (App. Div. 2009) (quoting Pressler, Current N.J. Court Rules, cmt. 1 on R. 1:7-4 (2009)).

The parties' arguments on appeal regarding opposition, reply, and sur-reply concerning defendant's motion for sanctions are secondary to the central point, in our view. The central point here is that the trial court has an obligation under our fee award jurisprudence, and Rule 1:7-4, to make detailed findings when issuing sanctions pursuant to N.J.S.A. 2A:15-59.1 and Rule 1:4-8.

V.

We reverse the order of June 3, 2022, awarding sanctions against plaintiff and remand to the judge to perform a lodestar analysis. Plaintiff shall have thirty days from the issuance of this opinion to file her opposition to defendant's motion for sanctions.

To the extent we have not addressed any of plaintiff's arguments, we conclude they are without sufficient merit to warrant discission in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed in part, reversed and remanded in part for proceedings consistent with this opinion. We do not retain jurisdiction.