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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3959-22**

**THE ESTATE OF LEONARDO
ROMERO, by his Executrix,
CARIDAD ROMERO
PERRICELLI,**

Plaintiffs-Appellants,

v.

**CARE ONE AT TEANECK, LLC,
d/b/a CARE ONE AT TEANECK,
DES 2009 GST TRUST, DES
HOLDING CO., INC., CARE
ONE, LLC, and DANIEL STRAUS,**

Defendants-Respondents.

Argued June 4, 2024 – Decided June 17, 2024

Before Judges Mayer and Paganelli.

On appeal from the Superior Court of New Jersey, Law
Division, Bergen County, Docket No. L-2859-22.

William Adam Friedman argued the cause for
appellants (Gaeta and Friedman, LLC and Napoli
Shkolnick PLLC, attorneys; Bradley T. Haney, on the
briefs).

Katelyn E. Cutinello argued the cause for respondents (Cocca and Cutinello, LLP, attorneys; Anthony Cocca and Katelyn E. Cutinello, of counsel and on the brief).

PER CURIAM

Plaintiff Estate of Leonardo Romero (Estate) appeals from a July 13, 2023 order dismissing its complaint, with prejudice, under Rule 4:6-2(e). We are constrained to vacate and remand.

Since this appeal arose from defendants' Rule 4:6-2(e) motion to dismiss the complaint in lieu of an answer, we recite the facts alleged in the Estate's complaint. The Estate's complaint alleged: (1) "R[omero] was admitted to defendant C[are One at Teaneck (Care One)] on or around March 7, 2020 and remained a resident of that facility until [his passing from Covid-19] on or around May 27, 2020"; (2) Care One "[w]as a nursing home facility"; and (3) "defendant D[aniel] S[traus] was an administrator and/or officer of defendants [Care One] and was responsible for the implementation of policy at the facility, and for oversight of the care provided to the residents at the facility, including" Romero.

The counts of the complaint generally included causes of action for: (1) violations of the New Jersey Practice of Public Health, citing N.J.A.C. 8:52-3.1-3.2, N.J.A.C. 8.34-1.1.6, and N.J.S.A. 30:13-5; (2) "negligence, gross negligence, and nursing home malpractice" "[p]rior to the beginning of the

COVID-19 pandemic"; (3) "careless[], unskillfull[], [and] negligent[]" "medical and nursing care, treatment and services" following the beginning of the pandemic; (4) conscious pain and suffering; (5) wrongful death; (6) gross negligence, carelessness, recklessness; (7) nursing home malpractice resulting in wrongful death; and (8) nursing home malpractice resulting in conscious pain and suffering.

Defendants filed a motion to dismiss the complaint under Rule 4:6-2(e), which the motion judge granted. The judge dismissed each count of the complaint with prejudice, finding the Estate's pleading: (1) in counts one and two "faile[d] to articulate or present any facts to demonstrate that [d]efendants rendered medical treatment to [Romero] which was unrelated to the Covid-19 pandemic, and which would warrant the application of the [Covid-19 Immunity S]tatute's exception"; (2) in counts four, seven, and eight alleged matters "the Covid-19 Immunity Statute applie[d] to," "there [we]re no facts being alleged by [p]laintiff to support a nursing malpractice cause of action," and "[p]laintiff's conclusory allegations . . . [we]re insufficient"; (3) in count three "the Covid-19 Immunity Statute cover[ed] the [d]efendants for the claims of negligence"; (4) in count six—as to defendants' gross negligence—"failed to allege sufficient facts" and was "conclusory"; and (5) count five—wrongful death—was dismissed because it "relie[d] on the success of claims . . . related to the[]

pleadings [that we]re dismissed pursuant to th[e] court's decision on the instant motion."

On appeal, the Estate notes that "[o]rdinarily, [a] dismissal for failure to state a claim is without prejudice." Similarly, defendants acknowledge, "[t]he dismissal of a complaint for failure to state a claim upon which relief may be granted pursuant to R[ule] 4:6-2(e) is normally without prejudice in order to allow the plaintiff to provide additional facts to address the deficiencies in the original pleading."

We begin our discussion with a review of the principles governing our analysis. Rule 4:6-2 provides:

Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses, . . . may at the option of the pleader be made by motion, with briefs: . . . (e) failure to state a claim upon which relief can be granted

[R. 4:6-2(e).]

"Rule 4:6-2(e) motions to dismiss for failure to state a claim upon which relief can be granted are reviewed de novo." Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019)). Thus, "we owe no deference to the trial judge's conclusions." State ex rel. Comm'r of

Transp. v. Cherry Hill Mitsubishi, Inc., 439 N.J. Super. 462, 467 (App. Div. 2015) (citing Rezem Fam. Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011)).

"At this preliminary stage of the litigation the [c]ourt is not concerned with the ability of [a] plaintiff[] to prove the allegation contained in the complaint." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (citing Somers Constr. Co. v. Bd. of Educ., 198 F.Supp. 732, 734 (D.N.J. 1961)). "For purposes of analysis [a] plaintiff[is] entitled to every reasonable inference of fact." Ibid. (citing Indep. Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956)). "The examination of a complaint's allegations of fact . . . should be one that is at once painstaking and undertaken with a generous and hospitable approach." Ibid.

In undertaking our review,

it is essential to canvass the complaint to determine whether a cause of action can be found within its four corners. In so doing, we must accept the facts asserted in the complaint as true. A reviewing court must search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned from an obscure statement of claim, opportunity being given to amend if necessary. Accordingly, all reasonable inferences are given to plaintiff. Courts should grant these motions with caution and in the rarest instances.

[Ballinger v. Del. River Port Auth., 311 N.J. Super. 317, 321-22 (App. Div. 1998) (emphasis added)]

(internal quotation marks and citations omitted)
(alteration in original).]

The New Jersey Supreme Court has made it clear, "[i]f a complaint must be dismissed after it has been accorded the . . . meticulous and indulgent examination . . . then, barring any other impediment such as a statute of limitations, the dismissal should be without prejudice to a plaintiff's filing of an amended complaint." Printing Mart-Morristown, 116 N.J. at 772. In other words, only if an insufficient pleading could not be corrected by amendment, should it be dismissed with prejudice at this stage.

Under Rule 1:7-4(a), a "court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon . . . on every motion decided by a written order that is appealable as of right." "[J]udges are under a duty to make findings of fact and to state reasons in support of their conclusions." Heinl v. Heinl, 287 N.J. Super. 337, 347 (App. Div. 1996) (citing R. 1:7-4(a)). "Meaningful appellate review is inhibited unless the judge sets forth the reasons for his or her opinion." Salch v. Salch, 240 N.J. Super. 441, 443 (App. Div. 1990). "Naked conclusions do not satisfy the purpose of R[ule] 1:7-4." Curtis v. Finneran, 83 N.J. 563, 570 (1980).

We apply these well-established principles to the matter here, and are constrained to vacate the July 13, 2023 order, and remand for further proceedings.

In response to COVID-19, the Legislature enacted L. 2020, c. 18 § 1(c)

that provides:

Notwithstanding the provisions of any law, rule, or regulation to the contrary:

(1) a health care professional shall not be liable for civil damages for injury or death alleged to have been sustained as a result of an act or omission by the health care professional in the course of providing medical services in support of the State's response to the outbreak of coronavirus disease during the public health emergency and state of emergency declared by the Governor in Executive Order 103 of 2020; and

(2) a health care facility or a health care system that owns or operates more than one health care facility shall not be liable for civil damages for injury or death alleged to have been sustained as a result of an act or omission by one or more of its agents, officers, employees, servants, representatives or volunteers, if, and to the extent, such agent, officer, employee, servant, representative or volunteer is immune from liability pursuant to paragraph (1) of this subsection.

Immunity shall also include any act or omission undertaken in good faith by a health care professional or healthcare facility or a health care system to support efforts to treat COVID-19 patients and to prevent the spread of COVID-19 during the public health emergency and state of emergency declared by the Governor in Executive Order 103 of 2020, including but not limited to engaging in telemedicine or

telehealth, and diagnosing or treating patients outside the normal scope of the health care professional's license or practice. The immunity granted pursuant to this subsection shall not apply to acts or omissions constituting a crime, actual fraud, actual malice, gross negligence, recklessness, or willful misconduct, and shall be retroactive to March 9, 2020.

[(Emphasis added).]

"Among other things, good faith means 'honesty in belief or purpose' and 'faithfulness to one's duty or obligation.'" State v. Crawley, 187 N.J. 440, 461 n.8 (2006) (quoting Black's Law Dictionary 701 (7th ed. 1999)). Actual malice is defined "as the intentional doing of a wrongful act without just cause or excuse." Jobes v. Evangelista, 369 N.J. Super. 384, 398 (App. Div. 2004). "The tort of gross negligence falls on a continuum between ordinary negligence and recklessness, a continuum that extends onward to intentional conduct." Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 363 (2016).

The COVID-19 Immunity Statute does not provide absolute immunity. Under the statute, the Estate asserted a viable cause of action and there was no statutory impediment to the filing of its complaint. See Printing Mart-Morristown, 116 N.J. at 772. The motion judge failed to explain why he departed from the Court's clear mandate requiring without prejudice dismissal of the complaint on a Rule 4:6-2(e) motion and allowing the Estate an opportunity to amend its pleading. After our de novo review of the record, we


conclude the better course was to dismiss the matter without prejudice and allow the Estate a specified number of days to amend its complaint.

Accordingly, we vacate the July 13, 2023 order and remand for further proceedings consistent with this opinion.

To the extent we have not specifically addressed any of the Estate's remaining contentions, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Vacated and remanded. 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