RECORD IMPOUNDED

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1622-16T2

ATLANTIC AMBULANCE CORPORATION,

Plaintiff-Respondent,

v.

JOHN G. CULLUM and MARY CLARE CULLUM,

Defendants-Appellants.

ATLANTIC AMBULANCE CORPORATION,

Plaintiff-Respondent,

v.

HALA HITTI and ANTOINE HITTI,

Defendants-Appellants.

APPROVED FOR PUBLICATION

June 29, 2017

APPELLATE DIVISION

Argued May 23, 2017 - Decided June 29, 2017

Before Judges Reisner, Koblitz and Mayer.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Morris County, Docket Nos. L-264-12 and L-2097-12.

Robert W. Mauriello, Jr., argued the cause for appellants (Graham Curtin, P.A., attorneys; Kelley J. Hastie and Mr. Mauriello, on the briefs).

James W. Brown (Skadden, Arps, Slate, Meagher & Flom) of the New York bar, admitted pro hac vice, argued the cause for respondent (Schenck Price Smith & King, LLP and Mr. Brown, attorneys; Lauren E. Aguiar (Skadden, Arps, Slate, Meagher & Flom) of the New York bar, admitted pro hac vice, Mr. Brown and Peter A. Marra, on the brief).

The opinion of the court was delivered by

MAYER, J.S.C. (temporarily assigned)

Appellants John G. Cullum and Mary Clare Cullum (Cullum) and Hala Hitti and Antoine Hitti (Hitti)[1] were granted leave to appeal denial of their motion for class certification. We affirm in part and remand in part.

In reaching this decision, we hold that ambulance service providers are not subject to consumer fraud claims under the "learned professional" exception because ambulance services are comprehensively regulated by a State agency. We also hold that the reasonableness of rates charged for ambulance services is a policy matter to be addressed by the Legislature and agencies within the Executive branch of government. We further determine that consumers are not required to pay a defendant's bill for allegedly overpriced services, in order to establish an ascertainable loss under the Consumer Fraud Act.

[1] Because Hitti and Cullum were defendants and counterclaimants, for simplicity we refer to them as "appellants" although we usually refer to parties by their status in the trial court.

We briefly recite the relevant procedural history. Atlantic Ambulance Corp. (Atlantic) filed complaints in the Special Civil Part against Cullum and Hitti seeking payment for ambulance services. Cullum and Hitti filed answers and counterclaims, alleging that Atlantic overbilled for ambulance services in violation of the Consumer Fraud Act, N.J.S.A. 56:8-1 to -20 (CFA). The counterclaims also asserted causes of action against Atlantic for negligence, common law fraud, breach of contract and unjust enrichment.[2] Appellants also sought class certification on behalf of themselves as class representatives and on behalf of all proposed class members who were overcharged for ambulance services during a six-year period. The Cullum and Hitti matters were transferred from the Special Civil Part to the Law Division and were consolidated. After five years of discovery, appellants filed a motion seeking class certification.

The facts giving rise to appellants' overbilling claims against Atlantic are undisputed. Cullum and Hitti initially alleged that they did not receive services from Atlantic and, therefore, the fees charged by Atlantic for services were improper and/or excessive. However, during oral argument on the class

[2] On appeal, appellants are pursuing their CFA and breach of "quasi-contract" claims only.

certification motion, counsel clarified that Cullum and Hitti received services, but claimed the bills they received were unconscionably high. The dispute focused on Atlantic's provision of ALS services, which are divided into three categories: ALS Assessment, ALS-1 and ALS-2. Different services are provided to patients for each ALS category, ranging from a basic physical examination and electrocardiogram readings to more complex medical treatments.

The amount billed to patients receiving ambulance services depends on the category of the support rendered. For ALS services, Atlantic charged the following: $1500 for an ALS Assessment, plus a mileage fee; $1750 for ALS-1 services, plus a mileage fee; and $2300 for ALS-2 services, plus a mileage fee. Appellants challenged Atlantic's formulation of the billing rates for ALS services. They claimed that Atlantic's fees for ALS services should be itemized, specifying the amount charged for each service, rather than bundled. Appellants alleged that Atlantic's uniform flat rates were excessive and disproportionate to the reimbursement rates assessed by insurance providers for similar services.

In Cullum's case, he passed out at his gym and Atlantic was called to provide ambulance services. Other than blood pressure monitoring, Cullum denied receiving any medical services from

Atlantic. Cullum's bill from Atlantic was $1750, plus a mileage fee for transporting him to the hospital. Cullum's health insurance provider paid a portion of Atlantic's bill, and he was responsible for payment of the outstanding balance of $1459.20.

In Hitti's case, she fainted in her home and Atlantic performed an ALS Assessment. Hitti declined transportation to the hospital but was charged $14 for transport of one mile. Hitti's bill was $1500, plus the mileage fee. Hitti's health insurance provider declined to pay Atlantic's bill due to a purported billing code error.

Appellants sought class certification on behalf of themselves and approximately 36,000 individuals who were allegedly overbilled by Atlantic.[3] Appellants claimed that their cause of action satisfied the requirements for class certification. See R. 4:32-1(a); see also Muise v. GPU, Inc., 371 N.J. Super. 13, 30 (App. Div. 2004) (the requirements are numerosity, commonality, typicality and adequacy). Appellants also argued that they met the requirements of Rule 4:32-1(b)(3) by raising "questions of law

[3] In the six-year period, appellants contend there were approximately 10,000 individuals who were charged a $14 mileage fee despite not being transported to a hospital (the non-transported individuals are identified as the "Hitti class") and 26,000 individuals who were transported to a hospital but were charged an exorbitant bundled rate for ambulance services (these individuals are identified as the "Cullum class").

or fact common to the members of the class [that] predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fair and efficient adjudication of the controversy." R. 4:32-1(b)(3); see also Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 106-07 (2007).

Appellants maintained their claims were common, typical and adequate with respect to the claims of the proposed class members because all were victims of Atlantic's unlawful billing practices and unconscionable rates in violation of the CFA.[4] Appellants contended that Atlantic had a duty to charge a reasonable fee for services and breached that duty. For the Hitti class, the issue was Atlantic's $14 mileage fee for patients not transported to a hospital.[5] For the Cullum class, the issue was the reasonableness of the fee charged by Atlantic for ALS-1 and ALS-2 services. Appellants reasoned that the time, energy and cost to pursue individual lawsuits against Atlantic would make it financially unfeasible for aggrieved class members to pursue their claims in the absence of class certification.

[4] Atlantic did not dispute the numerosity prong for class certification.

[5] During this litigation, Atlantic conceded that it was improper to charge a $14 mileage fee for individuals who were not transported to a hospital.

Atlantic countered that appellants' claims were not typical because proof of their claims would not prove the claims of the proposed class members. Atlantic highlighted the dissimilar aid and assistance rendered to individuals who received ALS-1 services and ALS-2 services, and noted that neither Cullum nor Hitti received ALS-2 services. Atlantic claimed the reasonableness of the fees charged for the services required individual adjudication on a patient-by-patient basis and, therefore, was not amenable to class certification. Further, Atlantic contended that neither Cullum nor Hitti suffered damages under a breach of contract theory or CFA violation claim because: (1) appellants denied receiving any services from Atlantic, and (2) even if they conceded receipt of services, appellants did not pay Atlantic's bill to establish an ascertainable loss under the CFA.

In deciding the motion, the judge found that appellants' claims were not common, not typical and not in alignment with the claims of proposed class members because appellants did not receive ALS-2 services and did not pay for Atlantic's services. The judge ruled that appellants did not suffer an ascertainable loss under the CFA because Cullum and Hitti failed to pay Atlantic's bill. The judge expressly rejected appellants' argument that an excessive bill from Atlantic was sufficient to prove an ascertainable loss.

On appeal, Cullum and Hitti argue the judge erred in denying class certification based upon his determination that they were unable to prove an ascertainable loss to sustain a CFA claim. We conclude that the judge's denial of class certification on that basis was flawed because appellants were not required to have paid Atlantic's bill to demonstrate an ascertainable loss.

> The certainty implicit in the concept of an "ascertainable" loss is that it is quantifiable or measurable. Moreover, it need not yet have been experienced as an out-of-pocket loss to the plaintiff. An "estimate of damages, calculated within a reasonable degree of certainty" will suffice to demonstrate an ascertainable loss.
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> [Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 248-49 (2005) (quoting Cox v. Sears Roebuck & Co., 138 N.J. 2, 22-23 (1994)).]

In the seminal CFA case, Cox v. Sears Roebuck & Company, the Supreme Court held that non-payment did not preclude the plaintiff from establishing an ascertainable loss. Cox, supra, 138 N.J. at 22 ("[T]o demonstrate a loss, a victim must simply supply an estimate of damages, calculated within a reasonable degree of certainty. The victim is not required actually to spend the money for the repairs before becoming entitled to press a claim.").

While we agree with denial of class certification on appellants' CFA claim, we do so for reasons other than those expressed by the motion judge. We affirm or reverse judgments and

orders, not reasons. Isko v. Planning Bd. of Twp. of Livingston, 51 N.J. 162, 175 (1968); Walker v. Briarwood Condo Ass'n, 274 N.J. Super. 422, 426 (App. Div. 1994). A correct result, even if grounded on an erroneous basis in fact or in law, will not be overturned on appeal. See GNOC, Corp. v. Dir., Div. of Taxation, 328 N.J. Super. 467, 474 (App. Div. 2000), aff'd, 167 N.J. 62 (2001).

While we disagree with the motion judge's rationale, we agree with Atlantic's alternative argument, that the CFA is inapplicable to ambulance service providers under the "learned professional" exception to the CFA.[6]

The "learned professional" exception was first recognized by the Supreme Court in Macedo v. Dello Russo, 178 N.J. 340 (2004). In Macedo, the Court noted that the CFA had not changed in the nearly forty years since its enactment. Id. at 344. The Court analyzed the cases involving professional services during that forty-year span, and concluded "our jurisprudence continues to identify learned professionals as beyond the reach of the [CFA] so long as they are operating in their professional capacities. The Legislature is presumed to be aware of that judicial view."

[6] In light of this decision, we need not address the parties' disputes concerning satisfaction of the requirements for class certification on appellants' fraud claim.

Id. at 345-46. The Macedo Court held that advertisements by learned professionals, specifically physicians:

> in respect of the rendering of professional services are insulated from the CFA but subject to comprehensive regulation by the relevant regulatory bodies and to any common-law remedies that otherwise may apply. We consider ourselves bound by that Legislative acquiescence. If we are incorrect in our assumption, we would expect the legislature to take action to amend the statute.
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> [Id. at 346.]

In the thirteen years since Macedo, the Legislature has not amended the CFA to include learned professionals. Thus, our jurisprudence continues to exempt professionals from the CFA. See Manahawkin Convalescent v. O'Neill, 426 N.J. Super. 143, 155-56 (App. Div. 2012) (nursing homes insulated from CFA), aff'd, 217 N.J. 99 (2014);[7] Plemmons v. Blue Chip Ins. Servs., Inc., 387 N.J. Super. 551, 556 (App. Div. 2006) (insurance brokers, as semi-professionals, insulated from CFA); Hampton Hosp. v. Bresan, 288 N.J. Super. 372, 383 (App. Div.) (hospitals insulated from CFA),

[7] The Supreme Court did not decide whether the nursing home's conduct was exempt from the CFA under the "learned professional" exception as the Court concluded the nursing home did not commit an "unlawful practice" under the CFA. In dicta, the Court expressed "doubt" whether the "billing and collection function at issue in [the Manahawkin Convalescent] case would qualify for the learned professional exception." Manahawkin Convalescent, supra, 217 N.J. at 124. However, the Manahawkin Convalescent case addressed who was responsible for payment of the nursing home's bill, not the reasonableness of the billing rates.

certif. denied, 144 N.J. 588 (1996); Vort v. Hollander, 257 N.J. Super. 56, 62 (App. Div.) (attorneys insulated from CFA), certif. denied, 130 N.J. 599 (1992). But see Suarez v. E. Int'l Coll., 428 N.J. Super. 10, 39 (App. Div. 2012) (educational and vocational training program governed by the CFA because the program was not overseen by any regulatory body and there were no regulations governing the school that would present "a patent and sharp" conflict with the CFA), certif. denied, 213 N.J. 57 (2013).

In Neveroski v. Blair, 141 N.J. Super. 365 (App. Div. 1976),[8] we held that real estate brokers were not subject to the CFA because:

> A real estate broker is in a far different category from the purveyors of products or services or other activities. He is in a semi-professional status subject to testing, licensing, regulations and penalties through other legislative provisions. Although not on the same plane as other professionals such as lawyers, physicians, dentists, accountants or engineers, the nature of his activity is recognized as something beyond the ordinary commercial seller of goods or services -- an activity beyond the pale of the act under consideration.
>
> Certainly no one would argue that a member of any of the learned professions is subject to the provisions of the Consumer Fraud Act

[8] In 1976, the Legislature amended the CFA to include real estate, thereby abrogating the court's holding in Neveroski. See N.J.S.A. 56:8-2. The Neveroski decision remains instructive as it supports the CFA's exclusion of learned professionals absent express legislative authority.

> despite the fact that he renders "services" to the public. And although the literal language may be construed to include professional services, it would be ludicrous to construe the legislation with that broad a sweep in view of the fact that the nature of the services does not fall into the category of consumerism.
>
> Similarly, in the absence of clear and explicit language in the statute, a broker who negotiates the sale of real estate and thereby renders "services" is nevertheless outside the scope of persons sought to be covered by the Act.
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> [Id. at 379-80 (citations omitted).]

We review the relevant statutory and regulatory provisions to determine whether ambulance service providers are learned professionals exempt from consumer fraud claims. By statute, the Department of Health (Department) is charged with overseeing the provision of health care services to the public, and ensuring that the services provided are "at a reasonable cost." N.J.S.A. 26:2H-1. The definition of health care services specifically includes ambulance services. N.J.S.A. 26:2H-2(b). The Department regulates ambulance service providers in accordance with N.J.S.A. 26:2H-1 to -26 and N.J.S.A. 26:2K-7 to -20.

Pursuant to its statutory authority, the Department promulgated regulations governing "Mobility Assistance Vehicle and Basic Life Support Ambulance Services," N.J.A.C. 8:40-1.1 to -7.4, and "Advanced Life Support Services; Mobile Intensive Care

Programs, Specialty Care Transport Services and Air Medical Services," N.J.A.C. 8:41-1.1 to -12.5. These regulations "define the operational requirements" of non-volunteer mobility assistance vehicles, basic life support ambulance services, mobile intensive care programs and specialty care transport services in the State. N.J.A.C. 8:40-1.2; N.J.A.C. 8:41-1.2. The Department's regulations establish stringent licensure requirements for ambulance service providers. N.J.A.C. 8:40-2.1 to -2.3; N.J.A.C. 8:41-2.1 to -2.3. Additionally, the Department has the right to take enforcement action against ambulance service providers. N.J.S.A. 26:2H-13; N.J.S.A. 26:2H-14; N.J.A.C. 8:40-7.2; N.J.A.C. 8:41-12.3.

Whether labeled "professionals" or "semi-professionals," we find that ambulance service providers are excluded from liability under the CFA for services rendered consistent with their professional license because they are regulated by the Department. The undisputed goal of the CFA is to protect consumers. Hampton Hosp., supra, 288 N.J. Super. at 378 (citing Martin v. Am. Appliance, 174 N.J. Super. 382, 384 (App. Div. 1980)). In Hampton Hospital, we noted that because hospitals are regulated by the Department, there was "no purpose to a requirement that hospital services be within the purview of the Consumer Fraud Act when those same services fall within the purview of the Department of

Health." Id. at 383. Here, the Department adopted extensive regulations governing ambulance services, and is authorized to take measures against ambulance service providers for violation of its regulations, including revocation of licensure. N.J.S.A. 26:2H-13; N.J.S.A. 26:2H-14; N.J.A.C. 8:40-7.2; N.J.A.C. 8:41-12.3.

Based upon the Department's rigorous regulation of ambulance services, the learned professional exception to the CFA precludes appellants' consumer fraud claim. To hold otherwise would present a situation "with a real possibility of conflicting determinations, rulings and regulations affecting the identical subject matter." Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 272 (1978). Since we determine that ambulance service providers are excepted from the CFA, denial of appellants' motion for class certification on the consumer fraud claim was the correct result.

Our determination that the CFA is inapplicable to Atlantic does not completely dispose of this matter. Appellants also sought class certification on their breach of contract claim against Atlantic. There are two distinct breach of contract claims in this case. One claim on behalf of the Cullum class is that Atlantic charged unreasonable rates for ambulance services.[9] And

[9] In opposition to class certification on this breach of contract claim, Atlantic argued it is necessary to bundle rates for

the other claim on behalf of the Hitti class is that Atlantic improperly charged a $14 mileage fee.

With respect to the breach of contract claim on behalf of the Cullum class, we determine that denial of class certification was proper, but for reasons other than those articulated by the motion judge.

The health care regulations and statutes enacted by the State's Legislative and Executive branches establish that adequate and affordable health care services are of utmost importance. In passing the Health Care Facilities Planning Act, N.J.S.A. 26:2H-1 to -26 (Act), the Legislature proclaimed a strong public policy to establish, promote and ensure adequate health care services in this State. The Act explicitly declares that it is "the public policy of this State that . . . related health care services of the highest quality, of demonstrated need, efficiently provided and properly utilized at a reasonable cost are of vital concern to the public health." N.J.S.A. 26:2H-1.

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ambulance services, to cover the cost of providing trained and licensed professionals, in fully equipped specialty vehicles, to respond to medical emergencies. The uniform rates charged by Atlantic for ambulance services also contemplate charity care subsidies and other financial considerations required to render ambulance services to patients who lack health care coverage or cannot afford health care services. See N.J.A.C. 8:33-4.10.

The Act further requires the Department to establish a State Health Planning Board (SHPB). N.J.S.A. 26:2H-5.7. The SHPB reviews applications for certificates of need and makes recommendations to the Department's Commissioner regarding the issuance of those certificates.[10] N.J.S.A. 26:2H-5.8(b). Under the Act, "no new health care service shall be instituted . . . except on application for and receipt of a certificate of need . . . ." N.J.S.A. 26:2H-7.[11] To obtain a certificate of need, the Act provides:

> No certificate of need shall be issued unless the action proposed in the application for such certificate is necessary to provide required health care in the area to be served, can be economically accomplished and maintained, will not have an adverse economic or financial impact on the delivery of health care services in the region or Statewide, and will contribute to the orderly development of adequate and effective health care services.
>
> [N.J.S.A. 26:2H-8.]

[10] "'Certificate of need' means the formal written approval of the New Jersey Department of Health and Human Services to construct or expand a health care facility or to institute a new health care service, in accordance with the requirements set forth at N.J.A.C. 8:33." N.J.A.C. 8:41-1.3.

[11] As used in this section of the Act, the term "health care service" includes "any service which is the subject of a health planning regulation adopted by the Department . . . ." N.J.S.A. 26:2H-7.

The Department issued a certificate of need to Atlantic to provide ambulance services. Prior to issuing a certificate of need, the Department and SHPB were required to consider whether the Atlantic's services could "be financially accomplished and licensed in accordance with applicable licensure regulations," would "not have an adverse impact on access to health care services in the region or State-wide," and would "contribute to the orderly development of adequate and effective health care services." N.J.A.C. 8:33-4.9. If Atlantic did not meet the statutory and regulatory requirements for issuance of a certificate of need, the Department would have denied the application.

From our review of the statutes and regulations governing health care in this State, we discern an unequivocal legislative policy to ensure adequate and effective health care services for all residents. The regulations governing certificates of need take into consideration many factors including, specifically, financial impacts and concerns. N.J.A.C. 8:33-4.9 and -4.10. Applicants seeking a certificate of need for health care services are required to provide services to persons who are financially "unable to obtain care." N.J.A.C. 8:33-4.10.[12]

[12] Atlantic accepts discounted payment for ambulance services depending upon the situation. For example, Atlantic reduces its fee by as much as forty percent for services provided to uninsured patients. Atlantic also has arrangements with third-party

Keeping in mind New Jersey's strong policies governing health care services, we consider the breach of contract claim on behalf of the Cullum class. Health care costs are a significant issue in the United States. Providing affordable health care services is a policy issue to be addressed by the Legislature and the Executive Branch agencies to which it has delegated the authority to carry out its policies. See DiCarlo v. St. Mary's Hosp., 530 F.3d 255, 259 (3d Cir. 2008).[13]

We find persuasive the decision of the Third Circuit Court of Appeals, which affirmed a trial court decision dismissing billing claims against a hospital:

> In the District Court, DiCarlo's primary argument was that the practice of charging uninsured patients significantly higher rates than insured patients and patients covered under Medicare, Medicaid, or the New Jersey Charity Care Program, for the same services and supplies, is wrongful and discriminatory. The District Court granted the defendants' motion for judgment on the pleadings and dismissed DiCarlo's complaint with prejudice.

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insurance companies to accept less than the billed amount for its ambulance services.

[13] Appellants contend that Atlantic is precluded from arguing courts cannot determine reasonable rates for health care services because no cross-appeal was filed. We disagree. Rule 2:3-4 requires the filing of a cross-appeal where "respondent seeks to expand the substantive relief granted in the order, and not just provide further support for sustaining the order." Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 2:3-4 (2017). See State v. Eldakroury, 439 N.J. Super. 304, 307 n. 2 (App. Div.), certif. denied, 222 N.J. 16 (2015).

> The District Court discussed the policy concerns about the rising cost of healthcare at length and found that the courts are ill-equipped to determine what reasonable hospital costs are, or to make a policy determination on behalf of the legislative branch.
>
> [DiCarlo v. St. Mary's Hosp., supra, 530 F.3d at 259.]

Thus, we agree that denial of class certification for the breach of contract claim on behalf of the Cullum class, challenging the reasonableness of fees charged by Atlantic, was proper.

We next review denial of class certification for the breach of contract claim on behalf of the Hitti class. Individuals requiring ambulance services do not "contract" with Atlantic. Nor can they negotiate with Atlantic regarding its services. The relationship between Atlantic and its patients is based upon implied contract or quasi-contract. See Wanaque Bor. Sewerage Auth. v. Twp. of West Milford, 144 N.J. 564, 574 (1996) (contracts implied-in-fact for services are inferred from the parties' conduct or from the surrounding circumstances).

Turning to the quasi-contract claim, patients not brought to a hospital, identified as the Hitti class, were charged for one mile of travel. Atlantic now admits that patients in the Hitti class were not transported to a hospital and, therefore, the $14 fee was improper. However, Atlantic did not refund or credit the $14 amount to those individuals. Consideration of the refund

issue for the Hitti class would not violate the policy concerns associated with the Cullum class because it is limited to a charge Atlantic admits was billed in error and does not implicate Atlantic's rate-setting decisions for ambulance services.

Because the judge did not consider whether the Hitti class could pursue class certification to recoup Atlantic's improperly charged $14 mileage fee under a breach of quasi-contract theory, we remand that issue to the trial court. The judge should determine whether the breach of quasi-contract claim against Atlantic, limited to recovery of the $14 mileage fee, is suitable for class certification.

In sum, we affirm denial of class certification on appellants' Consumer Fraud Act claim. We also affirm denial of class certification on the breach of contract claim as to the Cullum class. We remand the matter to the trial court to review class certification on the breach of quasi-contract claim as to the Hitti class.

Affirmed in part and remanded in part. We do not retain jurisdiction.