Superior Court of New Jersey

Appellate Division

Docket No. A-001731-23

SHAWNA MORRIS,	:	CIVIL ACTION
Plaintiff-Appellant,	:	ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ATLANTIC COUNTY
vs.	:	
DGMB CASINO HOLDING, LLC d/b/a Resorts Casino & Hotel,	:	DOCKET NO. ATL-L-003923-21
	:	Sat Below:
Defendant-Respondent.	:	HON. RALPH A. PAOLONE, J.S.C.

BRIEF AND APPENDIX FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

Shawna Morris, Plaintiff-Appellant, was involved in an unfortunate fall on March 9, 2020, when as a guest of Defendant-Appellee Resorts Casino, while attempting to enter a Jacuzzi in her hotel room she lost her balance and fell injuring herself. In attempting to prevent injury, Ms. Morris attempted to use a towel bar situated close by that was designed to only support towels.

Sadly it did not support Ms. Morris.

A grab bar designed to support a person should could have been situated close by to enable a person to make a safe entry into the jacuzzi.

Timothy Sass, MSCE, PE, a Professional Engineer agreed, and testified on behalf of Ms. Morris that the location of a towel bar created a hazardous condition given the design of the jacuzzi.

On January 5, 2024, the Trial Court granted Resort Casino's Motion for Summary Judgment, finding that Mr. Sass's opinion was a net opinion.

This Appeal arises from that determination since an issue of material fact existed where competent evidential materials were presented and when viewed in the light most favorable to Ms. Morris, was sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of her. Especially where Mr. Sass, in his testimony cites industry standards and codes that were violated by the lack of a grab bar, the presence of an improperly

installed and placed towel bar, and a design that was in his opinion hazardous for guests when they attempted to enter the jacuzzi where Ms. Morris was unfortunately injured.

PROCEDURAL HISTORY

Ms. Morris filed a Complaint against Resorts Casino on December 9, 2021. (Pa10) A Motion for Summary Judgment was filed by Resorts Casino on December 4, 2023. (Pa24) Opposition to the Motion was filed on December 26, 2023. (Pa83) A letter brief reply to the Opposition was filed on December 29, 2023. An oral argument was held on the Motion on January 5, 2024, and an Order granting Resorts Casino to deem the testimony of Mr. Sass as net opinion thereby granting Resorts Motion for Summary Judgment was issued. (Pa1) A Notice of Appeal was filed on February 12, 2024. 2021. (Pa2)

STATEMENT OF FACTS

Ms. Morris was caused to fall on March 9, 2020, while a guest of Resorts Casino. (Pa38, Deposition of Plaintiff, 54:22-24). As she attempted to get into a jacuzzi in her room, which proved difficult due to its design, she started to slip and in an attempt to prevent her fall grabbed onto a towel bar.(Pa45, Deposition of Plaintiff, 74:22-24) Unfortunately, the towel bar was

not a grab bar designed to support a person, and it pulled out of the wall causing Ms. Morris to fall, injuring herself. (Pa50, Deposition of Plaintiff, 81:21-23)

Timothy Sass, MSCE, PE, a Professional Engineer was deposed on July 17, 2023, and opined that the towel bar qualified as a plumbing fixture and under the International Property Maintenance Code, IPMC 305.5 and 504.1 was defective in its location and installation. *(*Pa101, Deposition of Timothy Sass 49:15-17 and 52:10-17)

ARGUMENT

I. The Trial Court abused its discretion when it disallowed the opinion of the Plaintiff's Expert Engineer as a net opinion, where the expert testified that the ingress to the jacuzzi was designed poorly, violated industry standards, and was a hazardous condition. (Pa1)

The failure of an expert to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion." Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App. Div. 2002). Mr. Sass does not cite industry standards that require a grab bar to be placed near the jacuzzi that Ms. Morris attempted to enter. The Trial Court places great emphasis on this fact. (T.33, 11-19) However, what Mr. Sass does state in his

testimony is that due to the location of a towel bar, said location does violate Section 504.1 of the IPMC since he considered the towel bar a plumbing fixture given its location relative to the jacuzzi where Ms. Morris fell.[1] (Pa99, Deposition of Timothy Sass, 44:25 and 45:1) Additionally, Mr. Sass opined that pursuant to Section 305.5 of the IMPC, since the towel bar was positioned near the jacuzzi rather then a guard rail, it should be capable of supporting normally imposed loads.[2] (Pa114, Deposition of Timothy Sass,101:1-23)

---

[1]**504.1General.**
Plumbing fixtures shall be properly installed and maintained in working order, and shall be kept free from obstructions, leaks and defects and be capable of performing the function for which such plumbing fixtures are designed. Plumbing fixtures shall be maintained in a safe, sanitary and functional condition.

All plumbing fixtures must operate adequately and perform their intended functions. Fixtures must drain quickly without permitting sewer gases to enter the structure. Fixtures are not to leak from either the water supply piping or the waste discharge piping.

Fixtures must not be worn or deteriorated so that they cannot be adequately cleaned. Kitchen sinks and lavatories that have defects that prevent them from being kept clean increase the likelihood that disease-causing organisms can be spread to food sources or from person to person. Fixtures with structural cracks can fail suddenly, possibly causing personal injury and further property damage.

[2]**305.1.1Unsafe conditions.**
The following conditions shall be determined as unsafe and shall be repaired or replaced to comply with the *International Building Code* or the *International Existing Building Code* as required for existing buildings:

> 1.The nominal strength of any structural member is exceeded by nominal loads, the load effects or the required strength.

And the reason Mr Sass gives for those opinions is that given the design of the jacuzzi, the towel bar is, “in a location and configuration with that excessively deep and wide jacuzzi tub to be anticipated for a layperson to use as a grab bar.” (Pa99, Deposition of Timothy Sass,42:2-11)

Simply put, the Trial Court failed to consider the above reasons Mr. Sass offered to logically support his opinion which was not contradicted by any other expert. The Trial Court as such abused its discretion in disallowing the testimony of Mr. Sass.

2.The anchorage of the floor or roof to walls or columns, and of walls and columns to foundations is not capable of resisting all nominal loads or load effects.

3.Structures or components thereof that have reached their limit state.

4.Structural members are incapable of supporting nominal loads and load effects.

5.Stairs, landings, balconies and all similar walking surfaces, including *guards* and handrails, are not structurally sound, not properly *anchored* or are *anchored* with connections not capable of supporting all nominal loads and resisting all load effects.

6.Foundation systems that are not firmly supported by footings are not plumb and free from open cracks and breaks, are not properly *anchored* or are not capable of supporting all nominal loads and resisting all load effects.

II. The Trial Court err when it did not view in the light most favorable to Ms. Morris, the sufficiency of the evidence and all legitimate inferences from the facts to permit a rational fact finder to conclude that there remained a genuine issue of material fact as to whether the ingress to the jacuzzi constituted a hazardous condition. (Pa1)

Pursuant to Rule 4:46-2(c) of the New Jersey Rules of Court. Summary Judgment should only be granted where “there is no genuine issue as to any material fact challenged and...the moving party is entitled to a judgment as a matter of law.” In determining whether a grant or denial of summary judgment was correct, we engage in de novo review and apply the same legal standard as the trial court. *Dugan Const. Co., Inc. v. N.J. Turnpike Auth.*, 398 N.J.Super. 229, 238, 941 *A.*2d 622 (App.Div.), *certif. denied*, *196 N.J. 346*, 953 *A.*2d 764 (2008); *Antheunisse v. Tiffany Co., Inc.*, 229 N.J.Super. 399, 402, 551 *A.*2d 1006 (App.Div. 1988), *certif. denied*, *115 N.J. 59*, 556 *A.*2d 1206 (1989). In so doing, the trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference. *Manalapan Realty L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378, 658 *A.*2d 1230 (1995).*Readington v. Solberg Aviation*, 409 N.J. Super. 282, 302 (N.J. Super. 2009).

Since disallowing the testimony of Mr. Sass was an abuse of discretion,

his testimony when properly admitted, would create a genuine issue as to a material fact in this matter. That being whether Resorts Casino allowed a hazardous condition to exist on its premises since the jacuzzi and towel bar as installed was designed poorly, violating industry standards. And in order to make out a *prima facie* case of premises liability, a plaintiff merely needs to show either (1) that defendant knew of the unsafe condition for a period of time prior to the plaintiff's injury sufficient to permit the defendant in the exercise of reasonable care to have corrected it; or (2) that the condition had existed for a sufficient length of time prior to plaintiff's injury that in the exercise of reasonable care, defendant should have discovered its existence and corrected it. *Collier v. Borgata, 2009 WL 2707359, *5 (N.J.Super.App.Div.2009) (citing Parks v. Rogers, 176 N.J. 491, 498 n. 3 (2003); Nisivoccia v. Glass Gardens Inc., 818 A.2d at 316 (2003); Bauer v. Nesbitt, 198 N.J. 601, 615 (2008)).*

Again, simply, Mr. Sass's opinion, if admitted, would raise a genuine issue of material fact that the Trial Court should have concluded in that the Defendant was negligent in breaching its duty to Ms. Morris, a patron, by allowing a hazardous condition to exist on its premises that exercising reasonable care it would have discovered.

CONCLUSION

Plaintiff-Appellant therefore respectfully requests that this Court reverse the Trial Court's order barring the testimony of Plaintiff's Expert Engineer and then granting Defendant-Appellee's Motion for Summary Judgment

RESPECTFULLY SUBMITTED,

DATED: April 22, 2024

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SHAWNA MORRIS, Plaintiff-Appellant, vs. DGMB CASINO HOLDING, LLC t/a RESORTS CASINO & HOTEL and JOHN/JANE DOE(S)(1-100) and ABC Business Entity(s)(1-100), Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-1731-23 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, ATLANTIC COUNTY Docket No. ATL-L-003923-21 Sat Below: Hon. Ralph A. Paolone, J.S.C Civil Action

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PRELIMINARY STATEMENT

Plaintiff slipped entering a bathtub in her room at the defendant casino. While she was falling, she grabbed onto the towel rack that was centered on the right-hand wall above the tub to steady herself. But the rack was not load-bearing, so it came out of the wall. Plaintiff landed and sustained injuries. She sued the casino for negligence.

Plaintiff's expert admits that the construction and design of the bathtub and towel rack do not violate code or industry standard, and that no regulation or standard required the casino to install a grab bar near the tub. There is also no allegation that other conditions in the bathroom, including the flooring or lighting, were dangerous or caused plaintiff to slip. Plaintiff's sole argument is that the towel rack *looked* like a grab bar so it should have been designed to meet the load-bearing requirements for grab bars. It if had, according to plaintiff, maybe she would not have fallen.

Plaintiff appeals the trial court's exclusion of her expert's opinion that the towel rack created a dangerous condition. Plaintiff cites no case law supporting her position that an expert's personal opinion, unsupported by any fact or industry practice, is admissible. Absent any evidence demonstrating the casino's negligence, defendant respectfully asks the Appellate Division to

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affirm the trial court's entry of summary judgment—because not all falls are caused by a proprietor's negligence.

PROCEDURAL HISTORY

On December 8, 2021, plaintiff filed a complaint and jury demand against defendants DGMB Casino Holding LLC ("defendant"), John/Jane Does (1-100), and ABC Business Entity(s) (1-100). (Pa10-16.)[1] The complaint sought to hold defendants liable for negligence after plaintiff fell while entering the bathtub in her hotel room, causing her injuries. (Pa10-16.) According to the complaint, plaintiff fell when the towel rack she was "using to assist her entry failed." (Pa11-12.)

Defendant answered the complaint denying the allegations. (Pa17-21.) During discovery, plaintiff admitted that she did not fall *because of* the towel rack's construction or due to her use of the towel rack to assist her entry; rather, she slipped while getting into the tub independently and sought to grab onto the towel rack to break her fall. (Pa48, Pa28, Pa84; 1T26-1 to 10.) Plaintiff submitted the report of an expert who testified that the bathroom was constructed in accordance with industry standards, though he personally opined that the tub would have been safer had the towel rack been constructed

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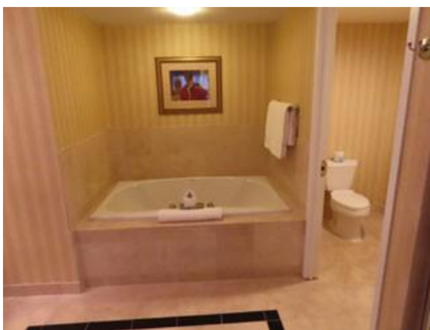
[1] Pa – Plaintiff's Appendix
Pb – Plaintiff's Brief
1T – Transcript of Motion Hearing dated January 5, 2024

to bear weight. (Pa67-80.) Defendant moved to exclude the expert's opinion and for summary judgment. (Pa24-82.) Plaintiff opposed the motion (Pa83-189), but the trial court granted it by order dated January 5, 2024 (Pa1; 1T23-20 to 34-13). Plaintiff appealed limited to the following issues: (1) whether the trial court abused its discretion in granting defendant's motion to exclude her expert's testimony; and (2) whether there remained a genuine issue of material fact as to whether the ingress to the bathtub was a hazardous condition. (Pa7; Pb3-8.)

STATEMENT OF FACTS

I. Facts relevant to plaintiff's alleged injuries.

Plaintiff alleges that on or about March 9, 2020, she fell while attempting to step into the jacuzzi tub inside of her guest room at Resorts Casino & Hotel, injuring herself. (Pa11-13, Pa26, Pa83; 1T24-7 to 25-10.) Below is an image of the tub set forth in plaintiff's expert report (see Pa62):



During her deposition, plaintiff testified that after she filled the bathtub up with water, she lifted her left foot over the tub surround and placed it into

the bathtub. (Pa43-47, Pa27, Pa83; 1T24-22 to 25.) In order to steady herself as she raised her left foot, she placed her left hand onto the tub surround, and placed her right-hand palm flat against the wall of the bathroom. (Pa45-47, Pa27, Pa83; 1T25-1 to 10.) After plaintiff placed her left foot into the tub, her left foot began to slide backwards, causing her to lose balance and fall forward. (Pa48, Pa27, Pa84; 1T25-1 to 10.) The bathroom lights were on and plaintiff could see clearly. (Pa52, Pa28, Pa84; 1T25-17 to 19.) There were no problems with the bathroom floor. (Pa41, Pa28, Pa84; 1T25-11 to -21.)

Plaintiff testified that as she was falling forward, she reached out and grabbed onto a towel rack on the right wall above the tub to try to catch herself. (Pa48, Pa28, Pa84; 1T26-1 to 10.) Prior to that time, she did not use the towel bar to assist getting into the tub. (Pa48, Pa28, Pa84; 1T26-1 to 10.) The towel bar, according to plaintiff, was a distance away from where she was entering the tub; she was not able to reach it from her position entering the tub until she was actively falling forward toward it. (Pa48, Pa28, Pa84; 1T26-1 to 10.) At the time, there were two towels folded on the rack, similar to what is reflected in the photograph above. (Pa50, Pa29, Pa84; 1T26-14 to 16; see Pa62.) As plaintiff was falling, she grabbed onto the towel rack, which was pulled out of the wall; plaintiff landed on top of it. (Pa50, Pa29, Pa84; 1T26-15 to 18.)

II. Plaintiff's expert report and testimony.

On January 30, 2023, Timothy Sass, a professional engineer and plaintiff's liability expert authored a liability report. (Pa54-65, Pa27, Pa83; 1T24-4 to 6.) Mr. Sass has never dealt with a case similar to this one—where an individual fell down while getting into or out of a bathtub. (Pa69, Pa27, Pa83; 1T24-7 to 12.) He also never encountered another case dealing with a towel rack on a wall. (Pa69, Pa27, Pa83; 1T24-7 to 11.)

Mr. Sass did not conduct slip resistance testing of the surface of the tub. (Pa77, Pa28, Pa84; 1T25-7 to 16.) He testified that the height of the tub violated no industry standard or code. (Pa74, Pa28, Pa84; 1T25-23 to 25.) There was also no legal or industry-wide requirement for defendant to have installed a step to help patrons to get into and out of the tub. (Pa75, Pa28, 42, see also Pa60-61.)

Mr. Sass testified that the towel rack was designed only to hold towels, which was what it was doing at the time plaintiff fell. (Pa72, Pa29, Pa84.) There is no industry code or standard that required: a minimum tolerance for loads or pressure in terms of weight towel racks must be able to sustain; that the towel rack be placed somewhere specific away from a bathtub's ingress; or a written warning that patrons should not use the towel rack as a grab bar.

(Pa73, Pa29, Pa84; 1T26-11 to 27-21.) The towel rack did not cause plaintiff to lose her balance before her fall. (Pa79-80, Pa29; see 1T26-14 to 18.)

Nonetheless, Mr. Sass personally opined that visually, the towel rack "appeared" like a grab bar. (Pa59.) And it created a defective condition because it could not hold as much weight as a grab bar is required to hold, "lack[ed] visual cues that would alert people to the [rack]'s lack of structural capacity," and was located "at the foreseeable entry point to the jacuzzi." (Pa59.) Mr. Sass cites no support or industry standard for his personal opinion.

III. Trial court's statement of reasons.

The trial court found that Mr. Sass's opinion was "totally speculative" and unreliable. (1T29-6 to 13.) "[T]here's no question that in this case that that towel rack did not look like a grab bar, and specifically, on the day in question when the plaintiff fell, it wasn't a grab bar, it was a towel rack that literally had two towels hanging from it." (1T29-14 to 20.) "I don't know how . . . Mr. Sass comes up with . . . the opinion that that bar appeared to be a grab bar." (1T29-21 to 23.) With regard to Mr. Sass's opinions that the location of the towel rack created the expectation that it would be capable of supporting the loads required by grab bars, the court found them to lack support. (1T29-23 to 31-4.) As for Mr. Sass's opinion that the "defective installation" of the towel rack "was responsible for the harm caused to the plaintiff," the court noted that

the bathtub's size did not violate any standard or regulation, and no code required the installation of a grab bar to help patrons in and out of the tub. (1T30-20 to 31-15.) At bottom, Mr. Sass

> fails to give any analysis that a grab bar was required, where it was required, where it was supposed to be installed, at what height it was supposed to be installed, where it was supposed to be located on the wall, which wall it was supposed to be located on, and why. He's applying codes and regulations that don't apply to a towel bar, to a towel bar in an effort to say that the towel bar I guess should have been a grab bar, and that's really what his opinion is, but he - - he cites nothing that says that was required.
>
> [(1T31-22 to 32-24.)]

Accordingly, because Mr. Sass's opinion was a net opinion, it could not be utilized to defeat defendant's summary judgment motion. (1T32-19 to 24.) On the undisputed facts, plaintiff did not prove that defendant was negligent in any way:

> They failed to provide that the - - the tub was in a dangerous condition because they failed to provide the Court with any standard, any code, regulation or any - - even the opinion of Mr. Sass, if he could have said I think that - - you know, in my opinion as a civil engineer with 25 years experience and having graduated and being a licensed engineer in four states that it's required at this height, in this position, in this place, and this is why it has to go in that position. We don't have that.
>
> So I - - I find that the defendant did not breach a duty owed to the plaintiff, that the expert failed to establish that - - that an installation of a grab bar

> under these circumstances was necessary or required to make the tub reasonably safe and to find that it was unreasonable without it . . . . There's no evidence by the plaintiff to show that the defendant must have a grab bar for the Jacuzzi.
>
> [(1T33-1 to 34-4.)]

LEGAL ARGUMENT

I. Standard of review.

Rule 4:46-2(c) provides that a motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

The Appellate Division reviews a trial court's grant or denial of a motion for summary judgment de novo, applying the same standard used below. Samolyk v. Berthe, 251 N.J. 73, 78 (2022); Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). "'[A] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special

deference.'" Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The Appellate Division applies a deferential standard, however, in reviewing factual findings by a judge. Balducci v. Cige, 240 N.J. 574, 594-95 (2020); State v. McNeil-Thomas, 238 N.J. 256, 271 (2019). "A reviewing court must accept the factual findings of a trial court that are 'supported by sufficient credible evidence in the record.'" State v. Mohammed, 226 N.J. 71, 88 (2016) (quoting State v. Gamble, 218 N.J. 412, 424 (2014)). "Reviewing appellate courts should 'not disturb the factual findings and legal conclusions of the trial judge' unless convinced that those findings and conclusions were 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Griepenburg v. Twp. of Ocean, 220 N.J. 239, 254 (2015) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)).

Furthermore, "[t]he admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Townsend v. Pierre, 221 N.J. 36, 52 (2015). The Appellate Division applies "an abuse of discretion standard to a trial court's determination . . . to exclude expert testimony on unreliability grounds." In re Accuane Litig., 234 N.J. 340, 391 (2018). "An abuse of discretion arises on demonstration of manifest error or injustice."

Rodriguez v. Wal-Mart Stores, Inc., 237 N.J. 36, 57 (2019) (internal quotations and citation omitted). An appellate court should "reverse an evidentiary ruling only it if 'was so wide off the mark that a manifest denial of justice resulted.'" Ibid. (quoting Griffin v. City of E. Orange, 225 N.J. 400, 413 (2016)).

II. The trial court did not abuse its discretion in disqualifying plaintiff's expert.

New Jersey's rules of evidence allow the admission of expert testimony only "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." N.J.R.E. 702. To that end, the net opinion rule requires an expert's opinion to have a factual foundation and "establish the existence of [a] standard" upon which the opinion is based. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011); see also N.J.R.E. 703; Johnson v. Salem Corp. Co., 97 N.J. 78, 91 (1984); Buckelew v. Grossbard, 87 N.J. 512, 524-25 (1981). "The admissibility rule has been aptly described as requiring that the expert give the why and wherefore that supports the opinion, rather than a mere conclusion." Pomerantz, 207 N.J. at 372 (internal quotations and citation omitted). A view "about a standard that is 'personal'" fails the net opinion rule. Id. at 373; Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999) ("[O]pinion testimony must relate to generally accepted . . . standards." (internal quotations and citation omitted)); Ibid. (excluding report that fails to refer to any written

document or unwritten custom or practice indicating consensus of architectural community supporting opinion).

In Jiminez v. GNOC Corp., the plaintiff alleged that she was injured by a defect in the handrail on an escalator at an Atlantic City casino. 286 N.J. Super. 533, 537 (App. Div. 1986). The plaintiff presented the expert opinion of a civil engineer in support of her allegations who opined that the handrail on the escalator had been improperly maintained, thereby causing the accident. Id. at 538. But the engineer did not identify how the maintenance of the handrail deviated from industry standards. Id. at 539. As a result, the Appellate Division ruled that the engineer's opinion was an incompetent net opinion that would not assist the jury in reaching a valid opinion on the subject. Id. at 540-43.

The District of New Jersey precluded an expert report in a case with even more favorable facts to the plaintiff than this one in Mendler v. Aztec Motel Corp., No. 09-2136 (Dec. 7, 2011) (slip op.). There, while the plaintiff motel guest was exiting the shower, she reached for the towel rack to assist her exit but it pulled out of the wall; the plaintiff fell backward and was injured. Id. at 2. The plaintiff hired an expert who opined that the defendant negligently failed to install a grab bar as required by industry standard. Id. at 3-4.

Judge Simandle explained that "[w]hen expert testimony is offered to prove the existence of an industry standard, an expert must offer evidence of actual customary practices or safety procedures." Id. at 9 (citing Diaz v. N.Y. Downtown Hosp., 287 A.D.2d 358, 358 (S.D.N.Y. 2001)). An expert report is insufficient if it "relies solely on the written guidelines, to the complete exclusion of any evidentiary facts supporting an actual custom or practice." Ibid. "[W]hile noncompliance with such a customary practice or industry standard may be evidence of negligence, the failure to abide by guidelines or recommendations that are not generally accepted standards in an industry will not suffice to raise an issue of fact as to a defendant's negligence." Ibid. In the case at issue, the expert relied solely on written guidelines; it did not present any factual evidence of any standard in the hotel industry or of any motel that has a grab bar installed in each bathroom. Ibid. And like in this case, "the parties agree[d] that there is no New Jersey regulation in place which requires motels to install grab bars in bathrooms." Ibid. The expert also did not offer any "evidence to support any opinion that it is an industry practice to design and install bathroom towel racks to serve a dual function as a grab bar for a bathtub." Id. at 10.

The Appellate Division should apply a similar analysis here. Based on the case law above, the trial court did not abuse its discretion in finding that

Mr. Sass's report was an improper net opinion. Mr. Sass did not testify within a reasonable degree of certainty, either within his purported area of expertise or under *any* industry standard, how defendant failed to exercise reasonable care in its bathroom design. He offered no opinion regarding the cause of plaintiff's slip, opting not to conduct slip resistance testing. He acknowledged the bathtub itself was up to code and there was no requirement that defendant install a grab bar near the tub. Nor did he opine that the towel rack failed industry standards or violated any regulation in terms of its location or ability to bear wait. Rather, Mr. Sass opined in his personal opinion that the towel rack—which was holding towels at the time plaintiff fell and was too far away for plaintiff to hold onto while she was entering the tub—looked like a grab bar. Consequently, based on its position "at the foreseeable entry point to the jacuzzi" it should have met the load-bearing requirements of grab bars or warned patrons it was not load-bearing.

Mr. Sass's opinion is quintessential net opinion. Plaintiff fails to articulate how the trial court's rejection of this opinion under the relevant case law constitutes an abuse of discretion. If any trial court decision warrants an affirmance, it is this one.

III. The trial court properly granted defendant summary judgment.

It has long been held in New Jersey that there is a presumption against negligence, and the burden of proving any negligence falls on plaintiff. Hansen v. Eagle Picher Lead Co., 8 N.J. 133, 139 (1951); Buckelew, 87 N.J. at 525; Wyatt v. Curry, 77 N.J. Super. 1, 6 (App. Div. 1962). The mere happening of an accident does not give rise to a claim for negligence, nor does it require the finding of negligence. Rivera v. Columbus Cadet Corps. of Am., 59 N.J. Super. 445, 450 (App Div. 1960). In this regard, the Appellate Division has long held:

> As a legal concept negligence is not an imaginative notion, a creature of mere surmise or conjecture; it denotes elements of factuality from which a lack of due care can be rationally deduced. It is not presumed that every injurious mishap that one encounters is necessarily attributable to the negligence of another. The factual pedestal stabilizing the logical inference of negligence must be established by some competent proof.
>
> [Overby v. Union Laundry Co., 28 N.J. Super. 100, 104 (App. Div. 1953) (emphasis added), aff'd o.b., 14 N.J. 526 (1954).]

Accordingly, plaintiff was required to prove that defendant breached some duty, which proximately caused plaintiff's alleged injuries. Brown v. Racquet Club of Bricktown, 95 N.J. 280, 288 (1984). Plaintiff fails to show that the trial court erred in granting summary judgment under that standard.

This is true even if the Appellate Division finds Mr. Sass's report was improperly excluded.

First, as to defendant's duty of care, a hotel generally owes a duty to its invitees to exercise ordinary or reasonable care to render the premises safe for their protection and to warn them of known unreasonably dangerous conditions, or conditions that should have been discovered by the exercise of reasonable care. Handelman v. Cox, 74 N.J. Super. 316, 331-32 (App. Div. 1962), aff'd, 39 N.J. 95, 112 (1963); see also Rigatti v. Reddy, 318 N.J. Super. 537, 541 (App. Div. 1999) (noting landowner has "non-delegable duty to use reasonable care to protect invitees against known or reasonably discoverable dangers" (internal quotations and citation omitted)). But the duty of a New Jersey hotel owner is not "to insure the safety of guests but only to exercise reasonable care to discover and correct dangerous conditions." Ranalli v. Edro Motel Corp., 298 N.J. Super. 621, 627 (App. Div. 1997); accord Shafer v. H.V. Thomas Co., 53 N.J. Super. 19, 22 (App. Div. 1958).

Plaintiff does not set forth evidence disputing that 1) the bathtub met industry standards, 2) there was no legal requirement or industry standard requiring defendant to install stairs or a grab bar by the bathtub, 3) there was no legal requirement or industry standard governing the placement or load-

bearing requirements of a towel rack, 4) there was no legal requirement or industry standard requiring defendant to warn patrons that the towel rack was not load-bearing, or 5) neither the floor nor lighting created a dangerous condition. As such, there is no evidence that defendant breached its duty to exercise ordinary and reasonable care to ensure its patrons' safety while using the bathtub. Zentz v. Toop, 92 N.J. Super. 105, 112 (App. Div. 1966) (explaining people can hurt themselves on almost any condition of premises, and it takes more than that to make condition unreasonably dangerous), aff'd, 50 N.J. 250 (1967).

Plaintiff's appeal essentially seeks to impose a heightened duty on defendant to *guarantee* its patrons' safety while using the bathtub. Judge Simandle found a similar argument in Mendler unpersuasive. Slip op. at 14 ("The absence of a grab bar . . . does not render a bathroom inherently dangerous. Rather, grab bars are more akin to preventative safety measures. By recognizing a duty to install grab bars in bathrooms, this Court would be imposing a stricter duty of care on [hotel] owners to implement preventative safety measures than is recognized by case law, state regulations or industry custom or practice under New Jersey law."); Id. at 15 ("[T]he Defendant did not have a duty to warn regarding the use of the towel bar as a grab bar."). Plaintiff's argument on appeal about the appearance of the towel rack as a grab

bar also contradicts plaintiff's own testimony that the rack was so far away she could not reach it until after she was falling down. So not only does plaintiff fail to present any evidence as to what dangerous condition *caused* her slip in the first place, but the trial court correctly found no evidence supporting plaintiff's claim that the towel rack was dangerous based on its appearance as a grab bar. As the court stated, the rack had towels on it. Mr. Sass's personal opinion notwithstanding, it clearly appeared to be a towel rack to both plaintiff *and* the court.

Equally important, even assuming a dispute over whether the bathtub's configuration was dangerous, summary judgment was still properly entered because plaintiff failed to prove that defendant had actual or constructive notice that the bathtub was dangerous and failed to act reasonably to remove the dangerous condition. Smith v. First Nat'l Stores, Inc., 94 N.J. Super. 462, 465-66 (App. Div. 1967); Parmenter v. Jarvis Drug Store, Inc., 48 N.J. Super. 507, 510 (App. Div. 1957). In this regard, plaintiff was required to prove that the dangerous condition had existed for a sufficient length of time prior to plaintiff's injuries so that in the exercise of reasonable care, defendant should have discovered its existence and prevented or corrected it. Tua v. Modern Homes, Inc., 64 N.J. Super. 211, 218-20 (App. Div.), aff'd o.b., 33 N.J. 476 (1960). She did not. To the contrary, there is no evidence that other patrons

were injured using similarly configured bathtubs. The mere "fact that the towel bar was close to the shower is not probative because it is not uncommon for towel bars to be close to the shower considering guests need to easily access their towels upon exiting the shower." Mendler, slip op. at 17.

Finally, although the trial court did not reach the issue of causation, plaintiff does not explain how the bathroom's construction proximately caused plaintiff's injuries. Again, the bathtub met industry standard; no grab bar was required to be placed near the tub. Mr. Sass's report blames the towel rack on her harm: "At the time when Ms. Morris attempted to steady herself, the bar was incapable of supporting the required nominal loads and broke free causing Ms. Morris to fall and resulted in harming Ms. Morris." (Pa60; see also Pa61.) But as repeatedly noted, the facts establish that plaintiff slipped and fell *before* she attempted to grab hold of the towel rack. And there is no evidence that the towel rack's coming out of the wall caused or contributed to the injuries she sustained when she slipped. In fact, she testified that her face landed on a towel and that the rack itself did not strike her. (Pa50-51.)

CONCLUSION

"'[T]he mere showing of an accident causing the injuries sued upon is not alone sufficient to authorize an inference of negligence.'" Vander Groef v. Great Atl. & Pac. Tea Co., 32 N.J. Super. 365, 370 (App. Div. 1954) (quoting

Hansen, 8 N.J. at 139-40). While it is unfortunate that plaintiff fell entering the bathtub, her expert's net opinion did not prove that the bathroom, which complied with industry standards, constituted a dangerous condition. The trial court did not err in excluding the expert's testimony or granting defendant summary judgment. Defendant respectfully requests that the Appellate Division affirm the trial court's rulings below.

Respectfully submitted,

COOPER LEVENSON, P.A.

By:

Dated: June 21, 2024

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