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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2465-15T1

PATTI HERRING,

Plaintiff-Appellant,

v.

KETTLEMAN'S BAGELS DELI AND GRILL, and CINTAS CORPORATION,

Defendants-Respondents.

Argued August 8, 2017 – Decided August 17, 2017

Before Judges Hoffman and Currier.

On appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-343-14.

Brian J. Levine argued the cause for appellant.

Jerald F. Oleske argued the cause for respondent Kettleman's Bagels Deli and Grill (Lebowitz, Oleske, Connahan & Kassar, LLC, attorneys; Mr. Oleske, on the brief).

Michael B. Devins argued the cause for respondent Cintas Corporation (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Mr. Devins and Joseph G. Fuoco, on the brief).

PER CURIAM

Plaintiff Patti Herring appeals from the January 26, 2016 orders for summary judgment entered in favor of defendants Kettleman's Bagels Deli and Grill and Cintas Corporation. After a review of the contentions in light of the record and applicable legal principles, we affirm.

We derive the facts from the summary judgment record viewing them in a light most favorable to the non-movant plaintiff.

On the day of these events, plaintiff was meeting some family members at Kettleman's for lunch. She walked into the deli, and when she did not see her family, she went back out the front door. When her family arrived, plaintiff reentered the store. As she did so, she tripped on the upturned corner of a mat that was on the floor just inside the entrance and fell. Surveillance video of the store showed another customer had dislodged the corner of the mat seconds before plaintiff came through the door the second time.

Kettleman's had contracted with defendant Cintas to provide several mats for the entrance and counter areas of the store. Kettleman's owner had not specified any particular sizing for the mats. The mats had been delivered and put into place by Cintas.

Plaintiff retained the services of an engineer, Wayne F. Nolte, PhD, PE. In his report, Nolte opined that

> [t]he only reason why the mat at the door flipped up and created an entrapment hazard for [plaintiff] was due to it being short[,] approximately 3'x 5' which placed its end in a foreseeable customer pathway within the store, giving opportunity for a customer to contact the corner and cause it to flip up. Placement of a ten foot (10') mat in that area would not have exposed a corner that was free to be flipped up.

The engineer cited to standards from the American National Standard Institute and National Safety Council in his report.

Both defendants moved for summary judgment. Kettleman's argued that it did not create a dangerous condition nor did it have actual or constructive knowledge of any unsafe condition within its store. With plaintiff entering the store and stepping on the upturned mat on the heels of the patron who had dislodged it, there was no opportunity for a reasonable business owner to notice and correct the condition. Kettleman's noted there was no authority cited by Nolte that the mat in place violated any regulation, statute, code or industry standard.

Cintas contended that plaintiff could not establish its claim of negligence as the company had delivered the mats to Kettleman's several days earlier, and no subsequent problems had been reported. Cintas noted that the surveillance footage showed the mat lying flat; it was not dislodged until a customer inadvertently kicked it up. Cintas delivered the mat size specified in its contract

with Kettleman's and contended that it was under no obligation to provide a larger mat.

Both defendants argued that Nolte had failed to provide any support for his opinion that a longer mat should have been used. Moreover, Nolte had conceded at his deposition that the corner of a 3' x 10' mat could be flipped up as easily as the mat in this store. Defendants posited that Nolte's opinion was an impermissible net opinion, requiring dismissal of the complaint.

In addressing defendants' motions, Judge Margaret Goodzeit found that expert testimony was required to establish the appropriate standard of care owed to plaintiff by defendants and whether Kettleman's had deviated from it. Nolte had provided such an opinion for plaintiff. However, the judge noted that at his deposition, Nolte had testified that

> he was unaware of any statute, code, regulation or law that would prohibit the use of a 3'x 5' mat such as the one that was at Kettleman's on the day of the accident, nor was he aware of any industry custom or standard that would prohibit the use of such a mat at the entrance of the store.

Judge Goodzeit concluded that the lack of data supporting Nolte's opinion rendered it an impermissible net opinion. She stated: "Nolte had no basis to conclude that the subject mat was either too short, or too light." As a result, plaintiff could not

support her theory of negligence against either defendant, and the motions for summary judgment were granted.

On appeal, plaintiff argues that the trial judge erred in granting the motions. She states that it was reasonably foreseeable that a 3'x 5' mat placed in the entranceway of this store could be uplifted by another customer. A longer mat or no mat at all in this specific area would have been preferable as either would have "eliminated the exposure of the corner of the mat to uplift by other customers." She also contends that expert testimony was not required to support her theory of negligence, and that Nolte's opinion was not a net opinion.

We review the grant of summary judgment, as we must, using the same standard as the trial court and viewing the evidence "in the light most favorable to the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "[T]he legal conclusions undergirding the summary judgment motion itself [are reviewed] on a plenary de novo basis." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 385 (2010).

Kettlemen's, as the proprietor of a store, owed to invitees such as plaintiff, a duty of reasonable care to guard against any dangerous conditions on the property of which Kettleman's either knew about or should have discovered. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 434 (1993). "That standard of care

encompasses the duty to conduct a reasonable inspection to discover latent dangerous conditions." Ibid. (citing Handleman v. Cox, 39 N.J. 95, 111 (1963); Restatement (Second) of Torts § 343 (1969)). "Ordinarily an injured plaintiff asserting a breach of that duty must prove, as an element of the cause of action, that the defendant had actual or constructive knowledge of the dangerous condition that caused the accident." Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003). A plaintiff can establish that a business owner had constructive knowledge of a danger by establishing that the owner "had an adequate opportunity to discover the danger and therefore would have discovered it had [the owner or occupier's employees] been reasonably alert." Bohn v. Hudson & Manhattan R. Co., 16 N.J. 180, 186 (1954) (citations omitted).

Plaintiff does not contend that defendants[1] had actual or constructive knowledge of this upturned mat; she argues only that it was foreseeable that a corner of the mat might be uplifted. Therefore, plaintiff posits that she has established sufficient proofs that defendants breached their duty of care. She also contends that expert testimony was not required for her to meet her proofs. We disagree.

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[1] Plaintiff does not differentiate between the defendants in her arguments on appeal.

The issue in this case is not whether it was reasonably foreseeable that a corner of a mat might be uplifted by someone's foot in this busy store; it is whether the placement of this size mat in the particular location created a foreseeable risk of injury. The determination of that issue required expert testimony. The average juror is not equipped to determine whether the mat delivered by Cintas and placed in Kettleman's was the proper mat for the particular location. The jury was not competent to supply the standard by which to review the defendants' conduct; plaintiff needed to establish the "requisite standard of care and [defendants'] deviation from that standard" through reliable expert testimony. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 407 (2014) (quoting Giantonnio v. Taccard, 291 N.J. Super. 31, 43 (App. Div. 1996)). Expert testimony is permitted under N.J.R.E. 702 "to assist the trier of fact to understand the evidence or determine a fact in issue." And, it is necessary when the subject matter is beyond the knowledge of the average layperson. See Schochet v. Schochet, 435 N.J. Super. 542, 550 (App. Div. 2014).

Nolte served as such an expert for plaintiff. But his opinion that a larger mat was required was not supported by any statute, regulation, industry standard or code. Some of the standards he mentioned in his report are not accepted as authority in this

state. Simply put, Nolte did not rely on anything for his opinion; that failure renders it an impermissible net opinion. See Saddle River v. 66 East Allendale, 216 N.J. 115, 123 n.3, 143-144 (2013) (concluding that an expert's bare conclusions, unsupported by factual evidence or other data, are inadmissible as a mere net opinion). An expert is required to "give the why and wherefore of his or her opinion, rather than a mere conclusion." Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002) (citation omitted).

Plaintiff was unable to support her claims against defendants without proper expert testimony. Therefore, the motions for summary judgment were properly granted.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION