

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5134-14T4

IMAGING SUBSPECIALISTS OF
NORTH JERSEY, L.L.C., and
WAYNE VALLEY IMAGING, L.L.C.,

Plaintiffs-Respondents/
Cross-Appellants,

v.

ADVANTEDGE HEALTHCARE
SOLUTIONS, INC.,

Defendant-Appellant/
Cross-Respondent.

Argued December 13, 2016 – Decided March 17, 2017

Before Judges Messano and Guadagno.

On appeal from the Superior Court of New
Jersey, Law Division, Passaic County, Docket
No. L-3993-12.

Michael D. Hultquist (Dentons US, L.L.P.) of
the Illinois bar, admitted pro hac vice,
argued the cause for appellant/cross-
respondent (Erika M. Lopes-McLeman, of
counsel; Jacob S. Buurma and Mr. Hultquist,
on the briefs).

Thomas Kamvosoulis argued the cause for
respondents/cross-appellants (Brach Eichler,
L.L.C., attorneys; Mr. Kamvosoulis, of counsel
and on the brief; Paul M. Bishop, on the
briefs).

PER CURIAM

Plaintiffs, Imaging Subspecialists of North Jersey, L.L.C., and Wayne Valley Imaging, L.L.C., are affiliated radiology practices offering services at St. Joseph's Regional Medical Center in Paterson, Mountainside Hospital in Montclair, and St. Joseph's Ambulatory Imaging Center in Clifton. Dissatisfied with the company then performing their billing and collection services, each plaintiff entered into separate but identical service agreements with defendant Advantedge Healthcare Solutions, Inc., to perform those services, effective January 1, 2011.

Troubles began in preparation of the contract's commencement date and continued thereafter. When attempts to negotiate and address the problems failed, plaintiffs issued a notice on August 23, 2011, terminating the agreements, effective December 31, 2011. In October 2012, plaintiffs filed suit, alleging breach of contract, breach of the covenant of good faith and fair dealing and unjust enrichment. Defendant answered and discovery ensued.

Following a non-jury trial over several days, Judge Rudolph A. Filko entered judgment for \$351,717 in favor of plaintiffs. This appeal ensued.

I.

Because defendant does not challenge Judge Filko's determination that it breached its contracts with plaintiffs, we need not detail much of the trial testimony. We provide some brief background to place the arguments now raised in context.

Each agreement provided that defendant would "apply its best efforts to obtain reimbursement for [plaintiffs'] charges for all clinical procedures and medical services . . . rendered . . . through billing of patients and third party payers and the management of [plaintiffs'] accounts receivable" Among other things, defendant agreed: to "develop and maintain electronic data interfaces directly with [plaintiffs'] hospital and other service sites . . . for the collection of patient demographic and/or charge data (including insurance policy information)"; "[u]se its best efforts to enter all procedural and demographic data necessary for patient and third party billing into its billing system in a timely . . . and accurate manner"; and "[a]pply its best efforts to follow-up on missing or incomplete information" Defendant also agreed to certain benchmarks regarding the accuracy and speed with which it would "code" plaintiffs' procedures and submit "clean claims" to providers.

Matthew Brennan was the president of Precision Healthcare Management, L.L.C. which provided "practice management services" to plaintiff during the relevant period, and was plaintiffs' designated expert for purposes of the litigation. Brennan was a certified "[p]rofessional [c]oder" and "[r]adiology [c]ertified [c]oder," who, as the testimony at trial revealed, had conducted more than seventy billing audits and more than one hundred coding audits.

Brennan's expert report addressed both liability and damages. In calculating plaintiffs' lost revenue due to defendant's breach of the service agreements, Brennan "performed two analyses." In the first method, he analyzed "detailed patient data" supplied by defendant and concluded "there was an unusually high rate of insurance claims with zero payments recorded." Brennan sampled fifty of these "unpaid encounters" and concluded thirty-two were the result of defendant's errors. He then sampled five other practices that he deemed comparable to plaintiffs', and found the average percentage of unpaid insurance claims was 3.33%, as compared to 7.85% in plaintiffs' practices. Applying the average unpaid rate, and employing other data regarding plaintiffs' practices, Brennan concluded that defendant's errors resulted in \$449,946 in lost revenue from unpaid claims.

Brennan's first method also employed a second calculation of underpaid claims, i.e., where payers provide "too little for a given service." Auditing two sample months during defendant's engagement, Brennan extrapolated the data for the term of the agreement and concluded plaintiffs suffered \$106,504 in damages from underpayments.

Brennan then employed a second methodology that compared plaintiffs' gross revenue from 2009 through 2012, including adjustments Brennan made for changes in the coding of procedures dictated by the American Medical Association and reductions in reimbursements adopted by Medicare. Although he gave no opinion regarding the amount of damages using this method, by comparing the annual variance from year-to-year, including the significant reduction in gross revenues during 2011, Brennan concluded this methodology "substantiat[ed] . . . the calculation of lost revenue performed" through the first method.

Defendant moved in limine pre-trial to bar Brennan's report.¹ In particular, defendant argued that Brennan based his methodology upon a personal sample selection that was not statistically sound. It also argued that Brennan failed to supply any supporting data

¹ The motion was dated November 10, 2014, plaintiffs' opposition was dated November 17, but the motion was not heard until the day before trial in February 2015.

regarding the five radiology practices used for comparison. Regarding the "gross revenue" methodology, defendant argued that Brennan's observations demonstrated nothing but "a difference in income" unattributed to any breach of the agreements.

In response, plaintiffs argued that defendant's expert agreed, "there [was] no one way to calculate damages in a billing case." Further, plaintiff noted that Brennan's report included an exhibit that provided the basic individual data regarding the five comparable radiology practices, and Brennan described how and why he selected them during his deposition.

Judge Filko initially reserved decision, but the next day denied defendant's motion. He noted both parties acknowledged there was no standard methodology in the industry for calculating damages. The judge observed that Brennan's opinions were based upon a thorough review of the files, his experience, knowledge of standard practices in the industry and personal knowledge acquired as plaintiffs' consultant during the entire contractual relationship with defendant. Judge Filko noted that defendant did not object to Brennan's qualifications but only his methodology. The judge concluded Brennan's report provided sufficient explanation for both the audit methodology and damage calculation in light of his experience in the industry, and, to the extent defendant took issue with the quality of those explanations or

underlying evidence, it would have opportunity to explore the matter on cross-examination.

Over two trial days, Brennan testified and reiterated the essentials of his report. Defendant also produced an expert, Robert Burleigh, who disputed Brennan's opinions as to both liability and damages.²

In a comprehensive written decision that accompanied the order for judgement, Judge Filko found Brennan to be a credible witness. The judge outlined Brennan's testimony regarding liability before turning to the question of damages, noting defendant's expert "confirmed there is no one standard methodology for calculating lost revenue in a medical billing case." Judge Filko then reviewed Brennan's testimony regarding the calculations made for lost revenue because of unpaid and underpaid insurance claims.

The judge noted the factors Brennan used in selecting the five comparable practices examined, which were in his report and explained during his testimony. The judge stated that Burleigh "agreed this is the kind of data industry professionals would review and rely on when comparing radiology practices," however,

² Plaintiffs deposed Burleigh and moved in limine to bar or limit his testimony at trial. Judge Filko denied that motion. A portion of Burleigh's deposition is in the appellate record, but his expert report is not.

the judge found significant Burleigh's opinion that only one of the five practices had a similar hospital-based/"free-standing" imaging mix in its practice. Judge Filko found Burleigh to be a credible witness.

The judge adopted Brennan's damage calculations in part. With respect to unpaid claims, the judge found Brennan provided "little, if any, information" concerning his five-practice sample to demonstrate they were sufficiently comparable. The judge determined, based on Brennan's and Burleigh's testimony, that only one of the five was equivalent to plaintiffs' practices. Judge Filko used the percentage of unpaid claims in that practice as a benchmark, not the lower percentage Brennan obtained by averaging the five. The judge then applied that rate, 4.32%, to the balance of Brennan's calculations and determined plaintiffs' damages from unpaid claims were \$351,717.

Judge Filko made no award of damages for underpaid claims. He stated that Brennan's testimony in this regard was "flawed," because the expert could not explain "why these claims were underpaid and whose error (if any) caused the underpayment." Moreover, Brennan performed no comparative analysis to establish whether plaintiffs' underpaid claims rate was out of the ordinary. Lastly, Judge Filko concluded Brennan's "'normalized gross revenue' analysis" was too speculative to support any damage award.

The judge entered judgment in favor of plaintiff for \$351,717 plus costs.

II.

Before us, defendant argues the judge erred by denying its motion in limine seeking to bar Brennan's report and subsequent testimony. Defendant further contends that without competent evidence as to damages, Judge Filko should have awarded plaintiffs only "nominal damages," as opposed to "creating [his] own damages calculation."

Plaintiffs counter by arguing Judge Filko properly denied the motion in limine and found plaintiffs suffered damages from defendant's breach. However, in their cross-appeal, plaintiffs argue Judge Filko should have awarded the full amount of damages supported by Brennan's testimony.

We have considered the arguments raised, in light of the record and applicable legal standards. We affirm on the appeal and cross-appeal.

Well-known standards guide our review.

Final determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review: "we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible

evidence as to offend the interests of justice[.]"

[Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting In re Trust Created By Agreement Dated December 20, 1961, ex. rel. Johnson, 194 N.J. 276, 284 (2008) (internal quotation omitted)).]

"Under contract law, a party who breaches a contract is liable for all of the natural and probable consequences of the breach of that contract." Totaro, Duffy, Cannova and Co., L.L.C. v. Lane, Middleton & Co., L.L.C., 191 N.J. 1, 13 (2007) (quoting Pickett v. Lloyd's, 131 N.J. 457, 474 (1993)). "We recognize that the goal is 'to put the injured party in as good a position as . . . if performance had been rendered.'" Id. at 13-14 (quoting Donovan v. Bachstadt, 91 N.J. 434, 444 (1982)).

"[A]lthough the non-breaching party must demonstrate that, in order to be compensable, 'the loss must be a reasonably certain consequence of the breach[,]. . . the exact amount of the loss need not be certain.'" Id. at 14 (quoting Donovan, supra, 91 N.J. at 445).

[O]ur courts have long held that "[p]roof of damages need not be done with exactitude It is therefore sufficient that the plaintiff prove damages with such certainty as the nature of the case may permit, laying a foundation which will enable the trier of the facts to make a fair and reasonable estimate."

[Ibid. (quoting Lane v. Oil Delivery Inc., 216 N.J. Super. 413, 420 (App. Div. 1987)).]

"The admission or exclusion of expert testimony is committed to the sound discretion of the trial court. As a discovery determination, a trial court's grant or denial of a motion to strike expert testimony is entitled to deference on appellate review." Townsend v. Pierre, 221 N.J. 36, 52 (2015) (citations omitted). However, "an expert's bare opinion that has no support in factual evidence or similar data is a mere net opinion which is not admissible and may not be considered." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 372 (2011) (citations omitted).

"The net opinion rule . . . mandates that experts 'be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable.'" Townsend, supra, 221 N.J. at 55 (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992)). However, "[a]n expert's proposed testimony should not be excluded merely 'because it fails to account for some particular condition or fact which the adversary considers relevant.'" Id. at 54 (quoting Creanga v. Jardal, 185 N.J. 345, 360 (2005)).

Initially, we reject defendant's argument that Judge Filko should have granted the in limine motion and barred Brennan from

testifying. We recently said, "[e]ven when a limited issue is presented, '[o]ur courts generally disfavor in limine rulings on evidence questions,' because the trial provides a superior context for the consideration of such issues." Seoung Ouk Cho v. Trinitas Reg'l Med. Ctr., 443 N.J. Super. 461, 470 (App. Div. 2015) (quoting State v. Cordero, 438 N.J. Super. 472, 484-85 (App. Div. 2014), certif. denied, 221 N.J. 287 (2015)). "This is particularly true when the 'motion in limine' seeks the exclusion of an expert's testimony, an objective that has the concomitant effect of rendering a plaintiff's claim futile." Id. at 470-71 (citing Bellardini v. Krikorian, 222 N.J. Super. 457, 463-64 (App. Div. 1988)). Moreover, Judge Filko properly recognized that because it was a non-jury trial, he was fully able to hear Brennan's testimony, decide its admissibility and judge its weight thereafter.

Defendant contends that Brennan's methodology was unreliable. First, it claims his use of "five unnamed" radiology practices to support an average rate of unpaid claims lacked foundation.

Both experts agreed there was no recognized industry standard for quantifying damages based upon a breach of service contract in these circumstances. However, Brennan explained the factors he utilized in selecting the five comparable practices, and defendant's expert agreed that those factors were appropriate.

Defendant argues that Brennan failed to link the average percentage of unpaid billings to any breach. However, the evidence regarding defendant's breach was pervasive, and Brennan explained the nature of defendant's breach in the context of fifty cases he sampled where plaintiffs received no payment whatsoever, despite having submitted bills to payers. Lastly, defendant's argument is somewhat weakened by the fact that at trial, Judge Filko rejected all but one of the comparable practices as a basis for calculation, accepting that single practice as valid for comparison purposes because it had a similar mix of hospital billings and billings from an outside "stand-alone" practice.

Defendant also contends that Brennan's sampling of fifty unpaid claims lacked any statistical relevance. Brennan acknowledged that fact, however, the purpose of selecting fifty unpaid claims was merely to verify the likelihood of defendant's errors. Of the fifty unpaid claims examined, Brennan concluded 64% were the result of defendant's error.

Plaintiffs correctly note that the major import of this sample was not to calculate the amount of damages because, in the end, Brennan's calculation relied on the high percentage of unpaid claims compared to the total number of plaintiffs' billings. The sample of fifty specific cases served more to support Brennan's

opinion as to defendant's liability, something Judge Filko recognized in denying the motion in limine.

Lastly, we reject defendant's argument that it was error for Judge Filko to "creat[e] [his] own damages calculation." Certainly, a factfinder may accept or reject any expert testimony in whole or in part in evaluating its relative credibility, Maudsley v. State, 357 N.J. Super. 560, 586 (App. Div. 2003), and reach whatever conclusion may logically flow from the aspects of such testimony it accepts. See City of Long Branch v. Liu, 203 N.J. 464, 491-93 (2010) (finding acceptable the jury's rejection of both experts' calculations to arrive at its own compensation award). The judge accepted Brennan's overall methodology, but he rejected some of the specific factual bases Brennan used to determine an average rate of unpaid billings for a radiology practice. We find no basis to reverse.

For the reasons already expressed, we conclude plaintiffs' cross-appeal lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed on the appeal; affirmed on the cross-appeal.

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


CLERK OF THE APPELLATE DIVISION