SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0315-16T1

MATTHEW T. MASCARI,

Plaintiff-Appellant,

v.

BORDENTOWN REGIONAL HIGH SCHOOL, BORDENTOWN REGIONAL BOARD OF EDUCATION, and BORDENTOWN REGIONAL SCHOOL DISTRICT,

Defendants,

and

VIRCO and VIRCO MANUFACTURING CORPORATION,[1]

Defendants-Respondents.

Argued December 19, 2017 – Decided January 25, 2018

Before Judges Hoffman, Gilson and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1849-13.

Michael G. Donahue argued the cause for appellant (Stark & Stark, PC, attorneys;

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[1] Properly known as Virco Mfg. Corporation.

Michael G. Donahue, of counsel and on the briefs).

Gita F. Rothschild argued the cause for respondent (McCarter & English, LLP, attorneys; Gita F. Rothschild, of counsel and on the brief; Ryan Richman, on the brief).

PER CURIAM

In this product liability action, plaintiff Matthew Mascari asserts he sustained injuries because of an alleged defectively designed folding rollaway cafeteria table manufactured by defendant Virco Mfg. Corporation (Virco). Plaintiff now appeals from the May 13, 2016 Law Division order granting Virco's summary judgment motion, entered after the trial court barred plaintiff's sole expert witness on the ground that he offered a net opinion. For the following reasons, we vacate the order granting summary judgment and remand for the trial court to hold a Rule 104 hearing to address the admissibility of plaintiff's expert testimony.

I

We discern the following facts from the record. On April 28, 2010, plaintiff, then a fifteen-year-old student, injured his finger during his lunch period at Bordentown High School. Plaintiff alleges he was sitting at a lunch table and "fidgeting" with the locking mechanism of the table, when another student stood up and leaned on the end of the table. This caused the table to start to fold-up, catching plaintiff's right index finger

in the table's locking hinge mechanism. Plaintiff's injured finger required surgery to repair lacerations of his flexor muscle and extensor tendon.

According to Virco, the table locks and unlocks by way of a gravity-fed locking bar (sometimes referred to as a "safety bar") located several inches in from the edge of the table. The locking bar runs underneath the width of the table; on each side of the table, a locking hinge is located four-and-eleven-sixteenths inches from the edge of the table.

Plaintiff retained Dr. Kevin Rider, a human factors engineering expert, to evaluate the table and the accident, and provide an expert opinion. On May 12, 2015, Dr. Rider issued his report, which listed the information he relied on, described the table and the accident, and discussed user expectancy and manufacturer responsibility.

In the report, Dr. Rider concluded:

> 1. [Plaintiff's] actions were reasonable and not a cause of the incident.
>
> 2. By manufacturing the incident table with locking hinges in close proximity to the intended users, [defendant] created an unreasonably dangerous condition that was the cause of [plaintiff's] incident.
>
> 3. [Defendant's] failure to design the incident table with an inaccessible locking mechanisms [sic] deprived users, such as

> [plaintiff], of the safety afforded by the same.
>
> 4. Had [defendant] designed the incident table with a locking hinge in the center of the table, users would still be able to manipulate the metal bar to unlock and stow the table, without being unreasonably exposed to the locking mechanism, and this incident would not have occurred.

The report also stated:

> The locking mechanisms of the incident table are located in line with the frame support of the table, near the center of each side of the table. This location allows easy and immediate access for a student's fingers to manipulate the bar in the same location as the locking hinge. The proximity of the locking hinge to the edge of the table increases the likelihood that a user's finger will be inadvertently located within the hinge as the table is moved from its open position.

Dr. Rider's report did not list the specific distance of the locking hinge from the edge of the table.

During a March 2016 deposition, Dr. Rider stated he measured the distance of the locking hinge from the edge of the table; however, his former employer retained the notes containing that measurement and he no longer had access to them. He could not remember the measurement during the deposition. When asked what would constitute a safe distance between the hinge and the edge of the table, Dr. Rider stated, "[A]s figure [two] lays out the dimensions for reaching hazards such as pinch points, it would lay

out between [three-and-one-half] inches and five inches as an acceptable distance to, for someone to not reach a pinch point with their finger tip." When asked to clarify, Dr. Rider stated a safe distance would be the "[ninety-fifth] percentile hand."

On May 3, 2016, Dr. Rider provided the court with a certification in response to Virco's motion to bar him as an expert witness. This certification listed the actual distance between the locking mechanism and the edge of the table as four-and-three-quarters inches. Dr. Rider then "confirmed that the [ninety-fifth] percentile hand measurement referenced in [his] deposition testimony would dictate a setback for the locking hinge of at least five-and-one-half inches." He listed his source as a report entitled "Comparative Anthropometry of the Hand." Defendant contends this report lists the ninety-fifth percentile hand length as 8.13 inches for men and 7.50 inches for women. Plaintiff contends the trial judge misunderstood Dr. Rider's deposition testimony stating a distance of three-and-one-half to five inches referenced figure two, which depicts "the maximum allowable openings with respect to the distance from the hazard . . . ." Dr. Rider's certification failed to clarify the meaning of the three-and-one-half to five inches measurement.

After the close of discovery, Virco filed a motion to bar the testimony of plaintiff's expert and for summary judgment. The

trial court barred Dr. Rider's testimony, finding it constituted a net opinion. The court reasoned that Dr. Rider, during his deposition, employed a methodology that concluded a distance of three-and-one-half to five inches between the hinge and the edge of the table was safe; however, he then abandoned his methodology, concluding the actual distance of four-and-three-quarters inches was unsafe. The court applied the reasoning of Kumho Tire,[2] a federal case, in concluding Dr. Rider's opinion constituted a net opinion and therefore was inadmissible.

Plaintiff requested a Rule 104 hearing to prove the admissibility of Dr. Rider's opinion. However, the trial court denied a separate hearing, reasoning the court afforded plaintiff ample opportunity to present Dr. Rider's opinions, through both his deposition and in his later written certification.

II

"The 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) (citing State v. Berry, 140 N.J. 280, 293 (1995)). As such, we accord deference to the trial court's grant of a motion to strike expert testimony, "reviewing it against an

[2] Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

abuse of discretion standard." Id. at 53 (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371-72, (2011)).

N.J.R.E. 702 and 703 frame the analysis for determining the admissibility of expert testimony. N.J.R.E. 702 allows opinion testimony from experts qualified in their fields. N.J.R.E. 703 addresses the foundation for expert testimony. Expert opinions must "be grounded in 'facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts.'" Townsend, 221 N.J. at 53 (quoting Polzo v. Cty. of Essex, 196 N.J. 569, 583 (2008)).

"The net opinion rule is a 'corollary of [N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" Id. at 53-54 (alteration in original) (quoting Polzo, 196 N.J. at 583). Therefore, courts require an expert to "'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Id. at 54 (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)). The net opinion rule requires experts to "identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable." Id. at 55

(quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992)). In short, the net opinion rule prohibits "speculative testimony." Harte v. Hand, 433 N.J. Super. 457, 465 (App. Div. 2013) (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997)).

However, simply because the opinion may be subject to attack on cross-examination for not including other meaningful considerations, does not make it a net opinion. Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App. Div. 2002) (citing Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 55 (App. Div. 1990)); see also Glowacki v. Underwood Mem'l Hosp., 270 N.J. Super. 1, 16-17 (App. Div. 1994) (declining to strike an expert's testimony as a net opinion as "[a]ny shortcoming in his method of analysis was explored and it was for the jury to determine the weight his opinion should receive.").

N.J.R.E. 104(a) provides a "judge may hear and determine" matters relating to "the qualification of a person to be a witness, or the admissibility of evidence" outside the presence of the jury. The decision to conduct a Rule 104 hearing rests within the sound discretion of the trial court. Kemp ex rel. Wright v. State, 174 N.J. 412, 432 (2002). However, when "the court's ruling on admissibility may be dispositive of the merits, the sounder practice is to afford the proponent of the expert's opinion an opportunity to prove its admissibility at a Rule 104 hearing."

Id. at 432-33. "The Rule 104 hearing allows the court to assess whether the expert's opinion is based on scientifically sound reasoning or unsubstantiated personal beliefs . . . ." Id. at 427 (citing Landrigan, 127 N.J. at 414).

Here, plaintiff requested a Rule 104 hearing to decide the admissibility of Dr. Rider's opinion. The trial court denied a hearing reasoning it gave Dr. Rider the opportunity to present his case both during the deposition and in his later written certification in response to defendant's motion to bar him as an expert witness.

Plaintiff contends the distance of three-and-one-half to five inches, which Dr. Rider referenced during his deposition, was not the safe distance between the edge of the table and the hinge, rather it was the safe distance from the gap between the tables to the "pinch point." We concede Dr. Rider's deposition testimony was not a model of clarity; however, a Rule 104 hearing would have allowed plaintiff a fair opportunity to clarify any confusion so the court could determine if the expert's testimony is "based on scientifically sound reasoning or unsubstantiated personal beliefs." Kemp, 174 N.J. at 427. The trial court should have provided Dr. Rider the opportunity to explain himself and clarify his deposition testimony during a Rule 104 hearing. A Rule 104 hearing was especially indicated here because barring plaintiff's

expert would clearly result in the dismissal of plaintiff's case. See Kemp, 174 N.J. at 432-33. Therefore, we remand for the trial court to provide plaintiff the opportunity to prove Dr. Rider's opinion meets the requirements of an expert witness, pursuant to N.J.R.E. 702 and 703, at a Rule 104 hearing.

We further find the trial judge erroneously relied on F.R.E. 702 governing admissibility of expert testimony. While N.J.R.E. 702 tracks the original version of F.R.E. 702, it does not incorporate the language added to the Federal Rule in 2000, which codified the principles of Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993) (outlining the federal requirements for scientific expert testimony).

In January 2009, the New Jersey Supreme Court Committee on the Rules of Evidence explicitly declined to amend N.J.R.E. 702 to follow the 2000 amendment to F.R.E. 702. 2007 – 2009 Report of the Supreme Court Committee on the Rules of Evidence, p. 3.

> The Committee reasoned that if the exact language of F.R.E. 702 was adopted, since the federal rule was intended to incorporate Daubert, it would create the erroneous impression that the Daubert standard governed the admission of expert testimony in New Jersey. Further, the Committee was concerned that New Jersey judges would be too inclined to be guided by the federal case law interpreting F.R.E. 702 and Daubert. The federal cases . . . are sometimes overly restrictive in the admission of expert testimony, tending to exclude evidence that,

> under current New Jersey law, would be properly admitted as having a reliable basis.
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> [Ibid. (citing Edward K. Cheng & Albert H. Yoon, Does Frye or Daubert Matter? A Study of Scientific Admissibility Standards, 91 Va. L. Rev. 471, 473 (2005)).]

Our Supreme Court recently granted certification in a case where the Court is expected to address the Daubert standard. In re Accutane Litig., 451 N.J. Super. 153 (App. Div.), certif. granted, ___ N.J. ___ (2017). However, we remain bound by the Court's decision in Kemp until the Court provides further direction on the matter. Here, the trial judge relied on Kumho Tire, a federal case applying the Daubert analysis, to bar plaintiff's expert report. The judge should have applied the Kemp standard instead.

We therefore conclude the trial court misapplied its discretion in barring Dr. Rider from testifying without first conducting a Rule 104 hearing. Accordingly, we vacate the orders entered barring Dr. Rider's testimony and dismissing plaintiff's complaint on summary judgment, and remand the case to the trial court for further proceedings consistent with this opinion. We clarify that on remand, the Rule 104 hearing can explore all legally recognized grounds for precluding Dr. Rider's opinion as inadmissible. We do not retain jurisdiction.

Vacated and remanded.