SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0605-16T4

GERALDINE A. RODRIGUES,
as Administrator of the
ESTATE OF ALFREDO RODRIGUES and
Administrator ad Prosequendum for
the ESTATE OF ALFREDO RODRIGUES,

Plaintiff-Appellant,

v.

ELEVEN VREELAND, LLC,

Defendant,

and

PCS WIRELESS, INC.,

Defendant-Respondent.

Argued March 20, 2018 – Decided April 9, 2018

Before Judges Yannotti, Carroll and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. L-4041-13.

Keith J. Roberts argued the cause for appellant (Brach Eichler, LLC, attorneys; Edward P. Capozzi, of counsel and on the brief; Kristofer C. Petrie, on the briefs).

Thomas M. Mulcahy argued the cause for respondent (Purcell, Mulcahy, Hawkins & Flanagan, LLC, attorneys; Thomas M. Mulcahy, of counsel and on the brief; Alyssa K. Weinstein, on the brief).

PER CURIAM

Plaintiff Geraldine A. Rodrigues, the administratix of the estate of her late husband, Alfredo Rodrigues (decedent), appeals from a July 6, 2016 Law Division order granting summary judgment dismissing her complaint against defendant PCS Wireless, Inc. (PCS) as barred by the exclusive remedy provision, N.J.S.A. 34:15-8, in the Workers' Compensation Act, N.J.S.A. 34:15-1 to -142 (the Act). Plaintiff also appeals from a companion order barring, in part, the report and testimony of her liability expert. We affirm.

I.

Decedent was employed as a maintenance worker for PCS for approximately six or seven years. He was not a licensed electrician. PCS was the sole commercial tenant of a multi-store building in Florham Park, which it leased from the building's owner, defendant Eleven Vreeland, LLC. PCS's maintenance supervisor assigned decedent to renovate a bathroom in the premises that had been used for storage and was in disrepair. On July 19, 2013, decedent and another PCS employee, Mahase Mungroo, began the bathroom renovation.

According to Mungroo, his instructions were to replace the toilet, install linoleum floor tiles, and repaint the walls and ceiling in the bathroom. He was not present when decedent received his instructions regarding the bathroom renovation. Mungroo reported that while he and decedent were preparing the walls and ceiling to be painted, they noticed the sheetrock under the sink was wet. When decedent touched the sheetrock, it "broke through."

Mungroo stated decedent then directed him to cut out a larger square of sheetrock so it could be patched, with the intention of pushing the water heater and electrical lines into the wall. Mungroo cut out a hole in the wall, measured the hole, and left the room to measure and cut a new piece of sheetrock. When he returned to the bathroom, he discovered decedent unconscious.

Police responded to the scene, and on their arrival they found the doors to the circuit breaker panel in the maintenance room were open. The 120-volt line connected to the bathroom was turned off, but the 277-volt line remained on because it was located in another circuit breaker panel.

The Occupational Safety and Health Administration (OSHA) investigated the accident. OSHA determined decedent was electrocuted when he touched a live 277-volt line connected to the water heater under the sink. He was pronounced dead after being transported in a comatose state to Morristown Memorial Hospital.

OSHA ultimately cited PCS for an "other than serious violation" pursuant to 29 CFR § 1926.21(b)(2) for failing "to instruct employees in the recognition and avoidance of unsafe conditions and the regulations applicable to his/her environment to control or eliminate any hazards or other exposure to illness or injury," and assessed a $7000 penalty.

In her complaint, plaintiff alleged the electrocution that resulted in decedent's death was proximately caused by PCS's willful and/or wanton conduct.[1] Such conduct included: creating and/or permitting a dangerous condition with respect to the electrical system and its component parts; requiring decedent to perform electrical work; disregarding decedent's safety; and disregarding applicable codes and regulations pertaining to the electrical system and its component parts. Plaintiff further alleged that PCS knew or should have known there was a substantial certainty that decedent would suffer serious and/or fatal injuries as a result.

Plaintiff's expert engineer, Daryl L. Ebersole, P.E., concluded:

> [1] PCS Wireless should have developed procedures and provided training to

[1] Plaintiff also asserted claims for negligence against the building owner, Eleven Vreeland, LLC. Those claims were settled and Eleven Vreeland, LLC is not a party to this appeal.

> [decedent]. [Its] failure to do so was a cause of [decedent's] electrocution.
>
> [2] PCS Wireless knew with 100% certainty that assigning electrical work to [decedent] without providing adequate training to him would lead to his electrocution. By assigning electrical work to him [its] actions caused him to be electrocuted.

At the conclusion of discovery, PCS moved for summary judgment. PCS also moved in limine to bar Ebersole's expert report and testimony. Judge Mark P. Ciarrocca heard argument on the motions on June 29, 2016. The judge granted PCS's motion for summary judgment on June 6, 2016. In his seventeen-page letter opinion, Judge Ciarrocca explained:

> The [c]ourt finds . . . that the substantial certainty standard was not met. While the touching of a live 277 volt wire may very well result in electrocution, there is nothing in the record to indicate that PCS Wireless knew with substantial certainty [decedent] was going to touch a live 277 volt wire. . . . There is no evidence in the record establishing that PCS Wireless knew with substantial certainty that [decedent] would either attempt to remove the water heater without waiting for the third party PCS hired to complete[] that task, or, accepting that they knew he would attempt to remove the subject heater, that he would ultimately end up in contact with a live 277 volt wire due to the fact that switches were mislabeled in the circuit box or due to the voltmeter being incorrectly calibrated. This is not the type of egregious situation that the [L]egislature intended to serve as an exception to the Workers' Compensation [Act] bar.

The court also held that Ebersole's report and testimony should be barred in part. The court allowed the expert's testimony for the limited purpose of explaining certain aspects of engineering, but barred Ebersole from offering his opinion that decedent was instructed to perform electrical work while knowing with certainty that this assignment would lead to his electrocution. Judge Ciarrocca found this testimony went to what the decedent "thought or did," and that "[f]acts regarding [decedent's] thoughts are not in evidence, additionally, the order in which he . . . undertook certain actions in the . . . bathroom and why he took such actions [remain] largely unknown."

The court entered memorializing orders on July 6, 2016. This appeal followed.

II.

On appeal, plaintiff argues she presented sufficient evidence showing that (1) PCS knew with substantial certainty that assigning electrical work to decedent would result in his electrocution; and (2) decedent's injury and the circumstances of its infliction was more than a fact of industrial employment and plainly beyond anything the Legislature intended the Workers' Compensation Act to immunize. In essence, plaintiff contends she may pursue common law remedies for damages because PCS knowingly exposed decedent to a virtual certainty of injury or death. In response, PCS

maintains that its conduct did not amount to an intentional wrong, and thus the Act provides the exclusive remedy to plaintiff.

We review a grant of summary judgment de novo, observing the same standard as the trial court. Townsend v. Pierre, 221 N.J. 36, 59 (2015). Summary judgment should be granted only if the record demonstrates 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." R. 4:46-2(c). We 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." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). If no genuine issue of material fact exists, the inquiry then turns to "whether the trial court correctly interpreted the law." DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 333 (App. Div. 2013) (citations omitted).

Workers' Compensation has been described by the Supreme Court "as an historic 'trade-off.'" Laidlow v. Hariton Mach. Co., Inc., 170 N.J. 602, 605 (2002). By implied agreement, employees volunteer to give up their right to pursue common-law remedies for work-related injuries and illnesses, in return for an automatic

entitlement to a limited recovery. Ibid.; see generally N.J.S.A. 34:15-1 to -142. Similarly, the employer accepts strict liability for workplace injuries in return for limited and definite financial exposure. This system is effectuated through the exclusive remedy provision:

> If an injury or death is compensable under this article, a person shall not be liable to anyone at common law or otherwise on account of such injury or death for any act or omission occurring while such person was in the same employ as the person injured or killed, except for intentional wrong.
>
> [N.J.S.A. 34:15-8.]

The intentional wrong exception to the exclusivity of relief provided by workers' compensation was first construed by our Supreme Court in Millison v. E.I. Du Pont de Nemours & Co., 101 N.J. 161 (1985). In that decision, the Court held that the plaintiffs' claims that the employer had fraudulently concealed that they were suffering from asbestos-related diseases, thereby delaying treatment and aggravating their existing illness, constituted an intentional wrong that was an exception to the workers' compensation bar. Id. at 181-82. The Court recognized that:

> [T]he statutory scheme contemplates that as many work-related disability claims as possible be processed exclusively within the Act. Moreover, if "intentional wrong" is interpreted too broadly, this single exception

> would swallow up the entire "exclusivity" provision of the Act, since virtually all employee accidents, injuries, and sicknesses are a result of the employer or a co-employee intentionally acting to do whatever it is that may or may not lead to eventual injury or disease.
>
> [Id. at 177.]

Thus, in Millison, the Court emphasized that the concept of "intentional wrong" encompassed more than a subjective intention to injure. In considering what level of risk and exposure to danger was "so egregious as to constitute an 'intentional wrong,'" the Court concluded that mere knowledge and appreciation of a risk of harm to an employee cannot be considered intent. Ibid.

Rather, the Court adopted a "substantial certainty" standard. Id. at 178. The Court held that a plaintiff can show an intentional wrong by proving two elements, known as the "conduct" and "context" prongs, respectively. First, the employer must knowingly expose the employee to a substantial certainty of injury. Second, the resulting injury must not be "a fact of life of industrial employment," and must be plainly beyond anything the Legislature intended the Act to immunize. Id. at 178-79.

The next major explication of the intentional wrong standard was articulated in Laidlow, 170 N.J. at 605. There, the Court examined the intentional wrong exception in the context of an industrial accident where a safety device had been disengaged for

reasons of speed and efficiency. The Court held that the employer acted with knowledge that it was substantially certain a worker would suffer an injury when the employer tied a safety guard on a rolling mill, releasing it only when OSHA inspectors were present, and although no injuries had occurred in the past, there had been several close calls that had been reported to the employer. Id. at 620-22. The Court further held that an employee injury under these circumstances would never constitute the simple facts of industrial life. Id. at 622.

Following Millison and Laidlow, the Court applied the two-part test to various factual circumstances. In Mull v. Zeta Consumer Products, 176 N.J. 385, 392-93 (2003), the Court held that an employer's wrongful conduct in removing safety devices from a machine, despite prior injuries, complaints by other employees, and prior OSHA safety citations, met the two-part exception for an intentional wrong. Likewise, in Crippen v. Cent. Jersey Concrete Pipe Co., 176 N.J. 397, 410-11 (2003), the Court allowed a worker's estate to seek common law damages where OSHA had cited the employer for several violations that had not been cured and the employer's safety manager admitted that conditions at the plant were dangerous and life-threatening. By contrast, in Tomeo v. Thomas Whitesell Constr. Co., 176 N.J. 366, 375-78 (2003), the Court upheld summary judgment for the employer despite

an alleged disabled safety device where the machine had warnings posted on it that the worker ignored by reaching into the machine while the propellers were rotating.

Most recently, in Van Dunk v. Reckson Associates Realty Corp., 210 N.J. 449, 474 (2012), the Court held that the Act's exclusivity bar applied even though the workplace accident produced an OSHA citation for a "willful" violation of OSHA safety rules. In Van Dunk, the plaintiff, a construction worker, was injured when a trench collapsed on him at his worksite. Id. at 453. The unsupported trench was excavated to a depth far beyond that which a worker could safely enter without safety equipment, according to OSHA safety rules and the employer's safety program. Id. at 454. The employer was charged with willful violation of OSHA regulations, did not contest the charges, and was fined. Id. at 455. The supervisor acknowledged the violations, which included the failure to use safety equipment that was available at the job site. Ibid.

The Court held "that the finding of a willful violation under OSHA is not dispositive of the issue of whether the employer in this case committed an intentional wrong." Id. at 470. With respect to the conduct prong of the intentional wrong exception, the Court explained that "[a] probability, or knowledge that [] injury or death 'could' result, is insufficient." Ibid. Instead,

the "intentional wrong must amount to a virtual certainty that bodily injury or death will result." Ibid. Furthermore, the Court observed that the "high threshold" of the context prong was not met by "the type of mistaken judgment by the employer and ensuing employee accident that occurred on [the] construction site." Id. at 474.

In finding no intentional wrong, the Court distinguished the cases described above because "those cases all involved the employer's affirmative action to remove a safety device from a machine, prior OSHA citations, deliberate deceit regarding the condition of the workplace, machine, or, in the case of Millison, the employee's medical condition, knowledge of prior injury or accidents, and previous complaints from employees." Id. at 471. In short, while the knowing failure to take safety precautions was an "exceptional wrong," it was not the type of egregious conduct associated with an intentional wrong. Thus, in addition to violations of safety regulations or failure to follow good safety practice, an intentional wrong must be accompanied by something more, typically deception, affirmative acts that defeat safety devices, or a willful failure to remedy past violations. See Laidlow, 170 N.J. at 616 (noting that the "mere toleration of workplace hazards 'will come up short' of substantial certainty") (quoting Millison, 101 N.J. at 179). Absent such egregious

conduct, the employee is limited to the workers' compensation remedy.

Applying the above principles, we first note that, as in Van Dunk, the employer received OSHA citations for violating safety regulations, pled guilty, and paid a fine. Similar to Van Dunk, while the facts here amount to negligence, perhaps even gross negligence, they do not approach the facts in cases such as Millison, Laidlow, Mull, and Crippen. In those cases, the employer was responsible for an affirmative act that made the workplace significantly less safe for its employees. The record contains no such affirmative act by PCS here.

Even viewing the facts in the light most favorable to plaintiff, we cannot find that the employer knowingly exposed decedent to a virtual certainty of harm. PCS did not remove any safety devices, did not receive or ignore any prior employee complaints, was not aware of any prior injuries, and did not have any previous OSHA citations for the same violation. Admittedly, PCS may have ignored applicable safety precautions and regulations, or failed to properly train its employees to recognize the dangers posed by working with electrical wiring, and in doing so created a greater risk of injury to decedent. While this conduct is clearly not to be condoned, we are convinced it does

not amount to an intentional wrong that allows plaintiff to avoid the workers' compensation bar.

In summary, the evidence, when viewed in plaintiff's favor, is simply insufficient to support the claim that PCS knew its actions were virtually certain to result in injury to decedent. Because our analysis of the evidence relevant to the conduct prong leads us to conclude that plaintiff has failed to meet her burden at this stage of the litigation of proffering prima facie proof of an intentional wrong, we need not address the context prong. See Laidlow, 170 N.J. at 623.

III.

Plaintiff also argues the trial court erred when it barred that portion of Ebersole's testimony and opinion that "[decedent] was instructed to perform electrical work while knowing with certainty that his assignment would lead to his electrocution." Plaintiff contends Ebersole's opinion was neither a net opinion nor impermissible ultimate opinion testimony.

A trial court's order barring expert testimony is reviewed for abuse of discretion. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371-72 (2011) (citing Kuehn v. Pub Zone, 364 N.J. Super. 301, 319-21 (App. Div. 2003)). The court's order should be overturned only "when a decision is 'made without a rational explanation, inexplicably departed from established policies, or

rested on an impermissible basis.'" U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467-68 (2012) (quoting Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 123 (2007)).

Pursuant to N.J.R.E. 703, an expert opinion must be based on "'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, which is a corollary of N.J.R.E. 703, "forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." Id. at 53-54 (quoting Polzo, 196 N.J. at 583). Under the net opinion rule, an expert is required 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, L.L.C., 216 N.J. 115, 144 (2013)). Furthermore, "[a] party's burden of proof on an element of a claim may not be satisfied by an expert opinion that is unsupported by the factual record or by an expert's speculation that contradicts that record." Id. at 55.

Here, contrary to plaintiff's argument, the trial court's decision regarding Ebersole's opinion testimony was not an abuse

of discretion or otherwise unsupported by adequate reasoning or explanation. Judge Ciarrocca properly recognized Ebersole's experience as an electrician and engineer would assist the jury in understanding the dangerous nature of electricity. Accordingly, if the case proceeded to trial, Ebersole would have been permitted to "provide information regarding issues such as voltage, the effects of [120] vers[u]s 277 voltage, and define other pertinent important terms that are beyond the ken of the average juror." However, the judge correctly barred Ebersole's opinion regarding why decedent undertook the electrical work, so as not to allow Ebersole to speculate whether PCS instructed decedent to remove the water heater or whether decedent did so on his own. We discern no abuse of the judge's discretion in barring this portion of Ebersole's opinion.

Affirmed.