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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1339-15T3

NAOMI PIPER,

Plaintiff-Appellant,

v.

THE CHEESECAKE FACTORY,

Defendant-Respondent.

Argued March 15, 2017 - Decided March 14, 2018

Before Judges Fuentes, Carroll and Gooden
Brown.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket No.
L-2534-14.

Todd Wallman argued the cause for appellant
(Law Offices of Richard A. Amdur, Jr.,
attorneys; Richard A. Amdur, Jr., of counsel
and on the brief).

Shanna R. Torgerson argued the cause for
respondent (Brownell Partners PLLC,
attorneys; Shanna R. Torgerson and Robert
Scibetti, on the brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

Plaintiff Naomi Piper filed suit against defendant The Cheesecake Factory, a restaurant located in Edison, to recover damages for an alleged injury to her left eye. Plaintiff claims she suffered this injury when a server accidentally dropped a dish approximately six feet from the booth where she was seated while having lunch with a friend. The dish shattered when it hit the floor and a fragment allegedly struck plaintiff in the face, injuring her left eye. After joinder of issue, the parties engaged in discovery and exchanged reports from physicians who examined plaintiff and opined as to the extent and cause of her alleged injury.

After the matter was submitted to mandatory arbitration pursuant to Rule 4:21A-1(a)(2), defendant rejected the arbitrator's award and filed a demand for a trial de novo under Rule 4:21A-6(c). Thereafter, defendant moved for summary judgment arguing plaintiff failed to establish a prima facie case of negligence. The motion judge agreed with defendant's argument and dismissed plaintiffs' complaint with prejudice as a matter of law. The judge found plaintiff's treating physician did not provide a medical foundation to establish a causal link between her alleged eye injury and the dish fragment. In this appeal, plaintiff argues the motion judge erred. We disagree and affirm.

Because the trial court dismissed plaintiff's complaint as a matter of law, we will review the following facts in the light most favorable to plaintiff. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); R. 4:46-2(c).

Mattheos Tsakon, a server employed by defendant, inadvertently dropped a plate of food on the floor. The plate landed approximately six feet from the booth where plaintiff and her friend were seated. In an affidavit submitted to the motion court, Tsakon averred that the booth is "encased by two pillars on either side with light fixtures atop each pillar." He claimed the pillars "create small panels that block the guests seated on either side of the booth." The plate shattered when it hit the floor. In an answer to defendant's interrogatories, plaintiff stated: "Fragments hit me in my left eye." However, at her deposition, plaintiff described what hit her face as "like watery stuff." She elaborated on what occurred immediately thereafter during her deposition.

Q. What happened after the waiter dropped the plates and everything is shattered?

A. I reported it, I told - - I got up and I washed my eye out because I felt something went in my eye. I reported it first, and it just kept bothering me, so I went to the bathroom and I flushed my eye out with water, but it was reported, I reported it to - -

Plaintiff left the bathroom and returned to the booth to join her friend. She did not finish lunch. Defendant did not charge her for the meal. She left the restaurant and drove herself home.¹ When she arrived home, plaintiff flushed her eye out with "warm water" because she "felt like something was there, and it just was irritating." When her symptoms persisted two days later, plaintiff consulted with Dr. Kenneth Darvin at the Santamaria Eye Center (Santamaria) in Perth Amboy. She also testified at her deposition that she may have sought treatment at the Raritan Bay Medical Center's emergency room. The record does not contain any evidence that plaintiff sought treatment in an emergency room.

Furthermore, contrary to plaintiff's assertions in her deposition, Santamaria's medical records do not indicate that Dr. Darvin observed a corneal abrasion in plaintiff's left eye or detected the presence of a foreign body in her eye. These records only show that Dr. Darvin performed a series of diagnostic tests and provided plaintiff with eye drops and other medications to alleviate her subjective complaints.

After several visits to Santamaria from April 12, 2013 to July 1, 2013, the staff at this medical facility attributed plaintiff's report of pain, discomfort, dryness, decreased vision,

¹ Plaintiff's friend drove her own car.

and photophobia to pre-existing blepharitis. According to defendant's expert witness, Dr. Jonathan W. Ditekoff, blepharitis is a chronic condition that causes a person's eyelids to become "reddened, itchy, and swollen." It is caused by blockages in a person's tear ducts and is commonly associated with genetics, diet, and/or a lack of cleanliness.

Because she was "not satisfied with what was going on" at Santamaria, plaintiff decided to consult with Dr. Hitesh K. Patel, an ophthalmologist. Her first visit with Dr. Patel occurred five months after the accident. As she had consistently maintained since the accident, plaintiff complained to Dr. Patel of sensing the presence of a foreign body in her left eye. Dr. Patel testified in his deposition that based on plaintiff's description of what had occurred at the restaurant, he "got the impression [the plate] fell next to her." Dr. Patel also testified that plaintiff told him "she went to the emergency room [but] didn't specify where and then she was seeing another ophthalmologist also." Plaintiff also told Dr. Patel that she did not have a history of problems with her left eye prior to this alleged injury.

In his ophthalmology consultation report dated March 13, 2014, Dr. Patel attributed plaintiff's subjective complaints to

asymmetrical Meibomian gland dysfunction,² generalized dryness, and corneal keratopathy.³ Dr. Patel treated plaintiff with artificial tears, prescription eye drops, warm compresses, and Doxycycline tablets. Dr. Patel reached the following conclusion with respect to plaintiff's medical condition:

Our final impression as of the last visit on 03/10/2014 was status post corneal foreign body OS with corneal injury with blepharitis and dry eyes. Patient[]s who have pre-existing blepharitis and dry eyes can be particularly sensitive to changes on the corneal surface, particularly a foreign body. If such a foreign body were to hit the eye, they can have a long-term scratchiness, foreign body sensation and pain[,] which sometimes is only improved temporarily by artificial tear drops and other dry eye and blepharitis regiments. The fact that the surface of the cornea was penetrated causes a corneal abrasion, and although it appears to be healing, microscopically the healing of the epithelium in the area of the abrasion is never as strong or adherent to the cornea. She has always felt more of an irritation in

² Meibomian gland dysfunction is "blockage or some other abnormality of the meibomian glands so they don't secrete enough oil into the tears." Amy Hellem, Meibomian Gland Dysfunction (MGD): The Cause of Your Dry Eyes?, ALLABOUTVISION.COM, <http://www.allaboutvision.com/conditions/meibomian-gland.htm> (last updated December 2016). This condition causes tears to evaporate quickly, thus contributing to dry eye syndrome. Ibid. It is also "associated with . . . blepharitis." Ibid.

³ Keratopathy is "characterized by the appearance of an opaque white band of variable density across the central cornea, formed by the precipitation of calcium salts on the corneal surface[.]" Michael Taravella, Band Keratopathy, MEDSCAPE, <http://emedicine.medscape.com/article/1194813-overview> (last updated March 3, 2016).

the left eye than the right eye. In fact she never complains of irritation in the right eye. This chronic pain which she is having may not improve for some time, or ever completely resolve. It has left her with a 15% permanent partial disability at this time. This conclusion was reached as it has already been over six months and she complains of constant pain in the left eye and she is extremely photophobic even upon the examination in the office. Such photophobia and pain will make it difficult for her to work in the future until this issue is resolved.

[Emphasis added.]

The record does not contain any evidence that Dr. Patel found a dish fragment or any other kind of foreign matter in plaintiff's left eye. Dr. Patel also confirmed at his deposition that he did not find any evidence of a corneal abrasion. Dr. Patel diagnosed plaintiff as having chronic dryness and Meibomian gland dysfunction. He made clear that both of these conditions can produce foreign body sensations and/or a "sandy, gritty feeling inside the eye."

Defendant's expert was Dr. Jonathan W. Ditekoff, a Board Certified Ophthalmologist and a Fellow of the American Academy of Ophthalmology. He examined plaintiff's eyes, as well as her medical records from Santamaria, Raritan Medical Center, and Patel Eye Associates. Based on his examination of plaintiff's eyes, Dr.

Ditkoff authored an expert report dated March 18, 2015.⁴ He found plaintiff's eyes were "within normal limits except for a meibomitis, mild punctate keratitis of the left eye[,] and a small corneal scar." Dr. Ditkoff particularly noted that the corneal scar was not mentioned in any of the prior medical records he reviewed.

Dr. Ditkoff opined that plaintiff has been suffering from blepharitis and meibomitis for years and that these conditions were causing her symptoms. He further opined that his diagnostic tests did not reveal any signs of injury or trauma to her left cornea. Although it was "unusual" for ophthalmology patients to experience "such asymmetric symptoms," Dr. Ditkoff stated it was not unprecedented or entirely novel. He stated that Dr. Patel's theory that plaintiff's pre-existing conditions were "exacerbated" by the injury she sustained at defendant's restaurant was not consistent with the medical evidence. Dr. Ditkoff opined within a "high degree of medical certainty" that plaintiff's alleged injury [was] causally unrelated to plaintiff's symptoms. According to Dr. Ditkoff, "Dr. Patel's deposition

⁴ In the interest of completeness, we note that Dr. Ditkoff amended his report with an affidavit dated September 30, 2015. This amendment did not change his opinion.

testimony as to the eye being jarred is pure speculation, as blepharitis, meibomitis[,] and dry eye cannot be caused by trauma."

Against this evidence, the motion judge made the following assessment of the evidence supporting plaintiff's cause of action:

Doctor Patel is the treating doctor. . . . [T]reating doctors usually don't write expert reports. Their . . . prim[ary] job is treating patients, not testifying in [c]ourt or preparing to testify in [c]ourt. So I take that into consideration, and I also am taking into consideration that an opinion of a treating doctor typically should be given greater weight than that of an independent medical examination doctor.

. . . .

Now, Dr. Patel doesn't explicitly connect a lot of the dots, but a lot of the dots can be implicitly connected, and I'm also incorporating medical facts that can be gleaned from the defendant's expert.

Basically defendant's expert put forth the proposition that the reason why the plaintiff feels as though she's got some foreign body in her eye is because of [blepharitis]. It's often accompanied with dry eye syndrome. It's . . . a blockage in the tear ducts and . . . that can occur if you've never had a foreign body in your eye.

Now, plaintiff testified she felt something go into her eye when this dish broke at The Cheesecake Factory and that's when all . . . this started. And though she may have had pre-existing [blepharitis], she didn't have this problem until this incident at The Cheesecake Factory.

Now, the defendant's counsel points out that . . . no foreign body was ever found in the plaintiff's eye, but there was evidence of a scratch on the cornea which does indicate at one time there was a foreign body in plaintiff's eye. That doesn't prove it was related to this incident when the plate broke at The Cheesecake Factory, but I have to give the plaintiff every benefit of the doubt. Doctor Patel really doesn't explicitly connect those dots, but he implicitly connects those dots.

Now, here's the part that I focused on most, and actually plaintiff's counsel asked me to focus on this as well. This is where we get to the whys and wherefores, and the big question . . . is why the plaintiff's [blepharitis] began to become symptomatic. She had the . . . feeling that there's something in [her] eye and [she] can't get rid of that feeling, and her testimony [indicates that] before [April 10, 2013,] she didn't have that feeling[.] . . . [B]ut after this incident she did. Why did the [blepharitis] become symptomatic as a result of this incident?

Now, that's the whys and wherefores that Dr. Patel has got to provide in order for this to not be a net opinion.

. . . .

So his testimony is essentially that he's seen this before. He's seen cases where . . . you have asymptomatic [blepharitis], then you have some sort of a trauma to the eye, and . . . the [blepharitis] then becomes symptomatic and you feel like there's something in your eye. They never feel right. They never, ever feel right.

Okay, well, that's what his experience has been. But why is that? He doesn't say why.

He doesn't indicate. He doesn't give any kind of a medical explanation as to why trauma in an asymptomatic [blepharitis] sufferer would make it symptomatic. Because of that I have to find this is a net opinion and I [have] to grant the [m]otion. I tried to find a way to keep this in, counsel, but Dr. Patel just didn't give me enough to hang that on.

[Emphasis added.]

N.J.R.E. 703 addresses the foundational requirements for expert testimony. It requires an expert to ground his opinion in facts or data derived from one of the following sources: (1) the expert's own personal observations; (2) evidence admitted at trial; or (3) evidence of "the type . . . normally relied upon by experts." Townsend v. Pierre, 221 N.J. 36, 53 (2015) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)). Therefore, while an expert must ground his opinion in fact, the opinion's evidential support is not limited to admissible evidence, treatises, or documentation; it may include information the expert has learned through his own personal experience in the relevant field. Rosenberg v. Travorath, 352 N.J. Super. 385, 400 (App. Div. 2002) (citing Bellardini v. Krikorian, 222 N.J. Super. 457, 463 (App. Div. 1988)).

Nevertheless, an expert may not provide the trial court with a "mere net opinion." Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 372 (2011). Our Supreme Court has described

the net opinion rule as a logical extension of N.J.R.E. 703. See, e.g., Townsend, 221 N.J. at 53 (quoting Polzo, 196 N.J. at 583); Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 410 (2014) (citation omitted); see also Buckelew v. Grossbard, 87 N.J. 512, 524 (1981) ("The 'net opinion' rule appears to be a mere restatement of the established rule that an expert's bare conclusions, unsupported by factual evidence, is inadmissible.").

The rule requires an expert to "give the why and wherefore" in support of his opinion. Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013) (quoting Pomerantz Paper, 207 N.J. at 372). In other words, an opinion consisting of "bare conclusions" or speculative hypotheses "unsupported by factual evidence" is inadmissible. Rosenberg, 352 N.J. Super. at 401 (citing Johnson v. Salem Corp., 97 N.J. 78, 91 (1984); Buckelew, 87 N.J. at 524). This court has noted that when an expert speculates, "he ceases to be an aid to the trier of fact and becomes nothing more than an additional juror." Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996). Our Supreme Court has similarly stated that unsubstantiated expert testimony cannot provide the benefit that N.J.R.E. 702 envisions: "a qualified specialist's reliable analysis of an issue 'beyond the

ken of the average juror.'" Townsend, 221 N.J. at 55 (quoting Polzo, 196 N.J. at 582).

Although no one disputes Dr. Patel's qualifications as an expert in the field of ophthalmology, his statements attributing plaintiff's symptoms are not based on objective medical evidence and are thus speculative. Dr. Patel's treatment records also fail to support his hypothesis. Dr. Patel did not find any evidence of a foreign material in plaintiff's left eye nor any evidence of a corneal abrasion. Despite the absence of a solid medical foundation, Dr. Patel suggested that based on his experience with other patients, a trauma may have exacerbated plaintiff's preexisting conditions and prolonged her discomfort. The motion judge correctly noted that Dr. Patel never articulated or explained how a traumatic event could have caused asymptomatic blepharitis or Meibomian gland dysfunction to become symptomatic. He merely stated that such a trauma-induced exacerbation was conceivable.

In an appeal from an order granting summary judgment, we review the record de novo, Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014), and employ the same standard as the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). In order to sustain a cause of action for negligence, plaintiff must establish four elements: (1) a duty of care; (2) a breach; (3) proximate causation; and (4) damages. Townsend, 221

N.J. at 51 (quoting Polzo, 196 N.J. at 584). Proximate cause consists of "any cause which in the natural and continuous sequence, unbroken by an efficient intervening cause, produces the result complained of and without which the result would not have occurred." Conklin v. Hannoeh Weisman, 145 N.J. 395, 418 (1996) (citation omitted) (internal quotation marks omitted).

Here, plaintiff failed to present competent evidence to satisfy her burden of proof with respect to the element of proximate cause. Despite seeking extensive medical attention, plaintiff was unable to produce any treatment records indicating the presence of a foreign material or a corneal abrasion in her left eye. Based on the absence of medically sound evidence establishing a causal link between plaintiff's alleged trauma and her reported symptoms, the motion judge properly granted defendant's motion for summary judgment and dismissed the case with prejudice.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION