SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1633-16T4

ROGER R. HAHN and CARMEN HAHN,
his wife, Per Quod,

Plaintiff-Appellant,

v.

THE CITY OF BAYONNE, NEW JERSEY;
HUDSON COUNTY, NEW JERSEY; THE
STATE OF NEW JERSEY; THE PORT
AUTHORITY OF NEW YORK/NEW JERSEY;
TEXAS EASTERN TRANSMISSION, LP;
SMITH SONDY ASPHALT CONSTRUCTION, CO.;
PACIFIC CONSTRUCTION, LLC and
RIVERVIEW PAVING, INC.,

Defendants,

and

HENKELS & MCCOY, INC.,

Defendant-Respondent.

HUDSON COUNTY,

Defendant/Third-Party Plaintiff,

v.

SMITH SONDY ASPHALT CONSTRUCTION CO., INC.,

Third-Party Defendant.

SMITH SONDY ASPHALT CONSTRUCTION CO., INC.,

Third-Party Defendant/
Fourth-Party Plaintiff,

v.

PACIFIC CONSTRUCTION, LLC, RIVERVIEW PAVING, INC. and HENKELS & MCCOY, INC.,

Fourth-Party Defendants.

Argued February 27, 2018 – Decided March 28, 2018

Before Judges Yannotti, Carroll and DeAlmeida.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-5824-13.

Gerald D. Miller argued the cause for appellant (Miller, Meyerson & Corbo, attorneys; Gerald D. Miller, on the briefs).

Alex J. Keoskey argued the cause for respondent (Meyner and Landis, LLP, and DeCotiis, FitzPatrick, Cole & Giblin, LLP, attorneys; Alexander Hemsley, III, Alex J. Keoskey and Edwin C. Landis, Jr., on the brief).

PER CURIAM

Plaintiff Roger R. Hahn[1] appeals from the November 9, 2016 Law Division order granting a directed verdict to defendant Henkels

[1] The complaint contained a per quod claim by plaintiff's wife Camille Hahn, who alternately appears in the record as Maria C.

& McCoy, Inc. and dismissing plaintiff's negligence claim with prejudice.[2] We affirm.

I.

Plaintiff was injured while riding his motorcycle on Kennedy Boulevard in Bayonne on June 4, 2013. He alleged he lost control of the motorcycle and struck a temporary construction sign (the "detour sign") in the roadway. Plaintiff attributed the accident to defendant's improper placement of the detour sign and/or sand or construction debris that was in the roadway.

Plaintiff testified he was "travelling northbound on Kennedy Boulevard when all of a sudden I lost control of the motorcycle and hit a sign . . . in the middle of the street." He stated he first observed the sign about twenty-five feet before he lost control of the motorcycle. During his direct testimony, plaintiff attributed his loss of control to debris, gravel and sand in the roadway. On cross-examination, plaintiff was confronted with his earlier deposition testimony that he did not know what caused him to lose control of the motorcycle.

Morille. Because her claim is derivative only, the singular term "plaintiff" is used in this opinion to refer to Roger R. Hahn.

[2] Plaintiff's claims against the remaining defendants were either dismissed or settled prior to trial and they are not parties to this appeal.

Morille testified she was driving about four or five car lengths behind her husband when the accident occurred. When asked to describe the accident she responded, "All I saw was a big cloud of dust, and then I stopped the car. I couldn't see my husband." Eventually she observed plaintiff lying unconscious "behind the tree." Morille stated she saw sand and debris all over the road, and opined this caused plaintiff to lose control of the motorcycle.

Robert Klingen testified as plaintiff's expert in the field of accident reconstruction. Specifically, Klingen was retained by plaintiff "to assess the presence of [the detour] sign and to render an opinion as to whether or not - - or how that contributed to the accident." He conducted a formal inspection of the accident site on September 18, 2014, more than a year after the accident.

Klingen described the detour sign as a temporary sign that is known as a "windjammer sign." The sign measured "three-and-a-half to four feet wide, just kind of a diamond shape," and was made of "a soft, vinyl fabric material . . . ." It was "set up on a stand that has four legs that extend out to give it balance." Klingen noted that sandbags are typically placed "on each one of those legs to keep the sign from blowing over in the wind."

Klingen referenced the "traffic control plan for this particular project" and noted the sign was set up on the wrong side of the intersection. Based on photos Klingen viewed of the

accident scene, he noted "there were numerous of these sandbags at numerous locations that had broken open, and there was sand spilled out on the roadway at various locations." Klingen concluded it was "clear" that the bags that hold the signs in place had not been properly maintained. He further opined the front-end sandbag securing the sign was struck by plaintiff's motorcycle.

On cross-examination, Klingen was questioned about defendant's connection with the detour sign. He testified:

> Q. I think you had mentioned something about Henkels & McKoy and their sign. Do you know that Henkels & McKoy was the only entity doing construction in that area, Kennedy Boulevard, at that time?
>
> A. I believe there were other companies as well.
>
> Q. And do other companies - - is it likely that other companies use this type of windjammer sign? Is that a fairly common sign?
>
> A. Yes. It's . . . a common sign.
>
> . . . .
>
> Q. And you didn't do any independent investigations to determine who owned the signs, correct?
>
> A. No, I did not.

By consent, portions of the deposition testimony of Bayonne Police Officer Megale were read to the jury, and the accident

report Megale authored was admitted in evidence. Megale prepared a diagram of the accident scene that depicted a sign in the street on Kennedy Boulevard, north of 5th Street. However, he was unable to recall what sign it was, how it got in the street, how it was secured, or whether it was there prior to the accident. Megale also stated he did not observe any sandbags in or around the area of the sign, or any dirt, rocks, or other debris in the roadway.

After plaintiff rested,[3] defendant moved for a directed verdict as to liability. Defendant argued plaintiff failed to establish defendant's ownership, responsibility, supervision, or maintenance of the sign, or that defendant otherwise caused the accident. The trial judge denied the motion without prejudice "while recognizing, of course, that the application can be brought at the end of the proofs as well."

Defendant presented the testimony of Maria Rodriguez, who was also driving northbound on Kennedy Boulevard when plaintiff's motorcycle passed her in the right lane. Rodriguez observed that plaintiff "accelerated the speed of his motorcycle, and at the

[3] Plaintiff also presented the expert testimony of Dr. Faisal Mahmood, an orthopedist, regarding the injuries he sustained as a result of the accident. In turn, Dr. Lynne Carmickle, an orthopedic surgeon, testified on behalf of defendant. Since this medical testimony does not pertain to the issues raised on appeal, we do not recount it in detail.

moment he accelerated, he fell." Rodriguez gave the following account of the ensuing events:

> Q. Did you see [plaintiff] fall off the motorcycle?
>
> A. Yes, I saw when he fell.
>
> Q. All right. And you saw a sign being hit?
>
> A. No, sir.
>
> Q. Okay. Do you know if he fell off the motorcycle before [he] or the motorcycle hit any other obstruction?
>
> A. No. Neither he nor the motorcycle hit the sign.
>
> Q. Okay. But did . . . he hit the sign before he fell off the motorcycle or after?
>
> A. No. No[t] before or after.
>
> Q. Okay. Could you explain that to me?
>
> A. Okay. The moment that he accelerated the motorcycle, he fell and went flying. As he was flying, he did hit, but it was the tree that he hit against, but the motorcycle . . . continued forward, straight and stopped at -- near a parked car.
>
> Q. All right. So the motorcycle hit the sign?
>
> A. No.
>
> . . . .
>
> Q. And after he fell, that's when the sign and the tree was hit?
>
> A. He hit against the tree.

Q. He did not hit the sign?

A. No, sir.

Defendant also presented the testimony of Gregg W. Frazier, a professional engineer and accident reconstruction expert. Frazier inspected the accident site on June 2, 2016, approximately three years after the accident occurred. Based on his investigation, Frazier disputed plaintiff's testimony that the detour sign was located in the middle of the road. Rather, he opined the sign was situated closer to the curb, in a parking lane. In Frazier's view, the sand depicted in the photos of the accident scene

> got there because the motorcycle hit the sandbags and split some of them open. And in the course of the motorcycle going over the top of the sign, it damaged the sandbags and spread some of the sand around. And that is also why you don't see the detour sign there anymore because that . . . went away with the motorcycle.

Frazier was unable to determine how plaintiff lost control of the motorcycle. Additionally, he found no evidence that defendant "owned or controlled or rented or supervised this [detour] sign[.]" On cross-examination, after viewing a photograph of the detour sign, Frazier testified the sign "does look like it had been struck by an 800-pound motorcycle."

Chad Simmons was employed by defendant as an assistant superintendent in June 2013 when the accident occurred. At that time, defendant was working on a pipeline project in Bayonne. Simmmons testified defendant placed windjammer signs held down by sandbags abutting the sidewalk when detouring traffic around its construction sites. However, defendant did not place a sign "on the north side of Kennedy Boulevard just past 5th Street" where the accident occurred.

After defendant rested, it renewed its motion for a directed verdict. Defendant argued plaintiff failed to prove (1) what caused him to lose control of his motorcycle; and (2) that defendant owned or controlled the detour sign. Hence, the jury would be asked to speculate as to both those issues. The trial judge agreed, finding no evidence that defendant owned the detour sign, and that "[t]he only connection between the two is speculation by the plaintiff." The judge also noted plaintiff did not remember what occurred, and that "[a]nything with regard to his testimony would only be speculation." In contrast, Rodriguez, who was the sole witness to the accident, testified there was no contact by plaintiff with the sign that would have caused the accident. The judge thus found there was no duty that was breached by defendant. As a result, the judge granted defendant's motion

for a directed verdict and dismissed plaintiff's complaint with prejudice. This appeal followed.

II.

We have recently noted that:

> The same evidential standard governs motions for judgment, whether made under Rule 4:37-2(b) at the close of the plaintiff's case, under Rule 4:40-1 at the close of evidence, or under Rule 4:40-2(b) after the verdict, namely: "[I]f, accepting as true all the evidence which supports the position of the party defending against the motion and according [that party] the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied . . . ." Verdicchio v. Ricca, 179 N.J. 1, 30 (2004) (citations omitted) (quoting Estate of Roach v. TRW, Inc., 164 N.J. 598, 612 (2000)). A judge is not to consider "the worth, nature or extent (beyond a scintilla) of the evidence," but only review "its existence, viewed most favorably to the party opposing the motion." Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969).
>
> An appellate court must essentially adhere to the same standard when reviewing the judge's order. Frugis v. Bracigliano, 177 N.J. 250, 269 (2003). We review the ruling de novo, using the same standard applied in the trial court. See Turner v. Wong, 363 N.J. Super. 186, 198-99 (App. Div. 2003). Although we defer to the trial court's feel for the evidence, we owe no special deference to the trial court's interpretation of the law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

[Lechler v. 303 Sunset Ave. Condo. Assoc., Inc., ___ N.J. Super. ___, ___ (App. Div. 2017) (slip op. at 8-9).]

Guided by this standard, we address plaintiff's argument that the trial judge erred in granting defendant's motion for a directed verdict. Plaintiff contends the judge improperly usurped the jury's role in determining credibility and failed to accept as true all evidence that supported plaintiff's claim that defendant acted negligently. Defendant argues the trial judge correctly granted its motion for a directed verdict because plaintiff "failed to come forward with any competent evidence showing that [defendant] owed plaintiff[] any duty, or breached a duty owed to [him], or proximately caused plaintiff['s] injuries."

To establish a prima facie case of negligence, a plaintiff must set forth evidence that: (1) the defendant owed him or her a duty of care; (2) the defendant breached that duty; and (3) the defendant's breach of duty proximately caused plaintiff damages. See D'Alessandro v. Hartzel, 422 N.J. Super. 575, 579 (App. Div. 2011). The burden of proof is on the plaintiff to show negligence and it cannot be met based on conjecture. Long v. Landy, 35 N.J. 44, 54 (1961). Simply showing the occurrence of an incident causing the injury sued upon is not alone sufficient to support a finding of negligence. Ibid.

Here, plaintiff was uncertain what caused him to lose control of his motorcycle. We agree with plaintiff there is sufficient evidence in the record for a jury to determine that, at some point, he may have struck the detour sign. However, plaintiff's assertion that either the sign or sand from the bags that secured it caused him to fall is sheer speculation. Plaintiff's fall could have been due to some debris in the road or other cause, for which defendant bore no responsibility.

More importantly, even if the presence of the detour sign, or sand from the bags that secured it, caused plaintiff's crash, there is simply no evidence in the record that defendant owned, maintained, or was responsible for the placement of that sign. The trial court aptly concluded that any finding by the jury that defendant owned the sign, or was responsible for its maintenance or placement, would be based on conjecture rather than fact. Consequently, the court properly entered a directed verdict in defendant's favor.

Affirmed.