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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-2171-17T2

BOB MEYER COMMUNITIES,
INC., a New Jersey
corporation,

Plaintiff-Appellant,

v.

OHIO CASUALTY INSURANCE
COMPANY, and AMERICAN FIRE
AND CASUALTY COMPANY,

Defendants-Respondents,

and

HARLEYSVILLE INSURANCE
COMPANY,

Defendant.

Submitted April 16, 2018 – Decided May 25, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey,
Law Division, Burlington County, Docket No.
L-1750-16.

Ryan Milun argued the cause for appellant (The Killian Firm, PC, attorneys; Mr. Milun, on the brief).

John T. Coyne argued the cause for respondent (McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys; Mr. Coyne, on the brief).

PER CURIAM

By leave granted, plaintiff Bob Meyer Communities, Inc., appeals from an order denying its motion for reconsideration of an order barring its expert, Herbert J. Cannon, from testifying about certain damages. We reverse.

I

We glean the following from the record provided on appeal. In 2000, plaintiff was the general contractor for an entity that constructed twelve single-family homes. The construction was performed by plaintiff's subcontractors. In 2007 and 2008, the homeowners discovered some of the wood in the walls of their homes was rotting. The homeowners complained to plaintiff, which ultimately settled all claims the homeowners asserted.

Plaintiff now seeks to recover its defense costs and the amounts it paid to the homeowners to settle their claims from defendants Ohio Casualty Insurance Company and American Fire and

Casualty Company.¹ The record is somewhat unclear as to when defendants' policy periods commenced, but we surmise they began before construction on the homes was completed. There is no question the last applicable policy period expired on July 8, 2004.

One of plaintiff's experts, architect Herbert J. Cannon, authored a lengthy expert's report, noting the following. The exterior wall system of the subject homes was made up of a wood frame, "oriented strand board" (OSB) sheathing, and a "stucco assembly," which is composed of cement stucco, stone, and manufactured stone veneer. He stated that when water infiltrates into a wall system, it damages the sheathing. Specifically, the water causes the sheathing, which is porous, to soften, swell, and eventually "completely breakdown[,] compromising the building structure" He commented the kind of damage caused by water infiltrating into the type of sheathing installed in the subject homes has been the topic of "multiple articles and scientific investigations," and cited studies in his report.

¹ Plaintiff settled with the remaining defendant, Harleysville Insurance Company. For the balance of the opinion, the term "defendants" shall refer to Ohio Casualty Insurance Company and American Fire and Casualty Company.

Referring to various building codes, Cannon observed there must be appropriate flashing around windows and door openings to minimize water infiltration. He noted that, based upon the reports of those who investigated the homes after the water damage was discovered, the flashing around the windows and, to a limited extent, the door openings in the homes either were not properly installed or were not installed at all. The deficiency in the flashing exposed the exterior wall system and, in particular, the sheathing, to damage from water infiltration. In addition, the mechanisms to drain water trapped inside of the exterior wall system in each home were faulty. As a result of the damage caused by the water infiltration, the stucco assembly and sheathing had to be removed and replaced on all twelve homes.

During his deposition, Cannon testified the water damage began with the first rainfall. The amount of water that infiltrated into the exterior wall system during each rainfall varied, depending upon the amount and the intensity of the rain. However, Cannon noted that over a twelve-month period, there is significant rain and, each time water infiltrated into a system, more damage occurred. Therefore, the extent of damage to the sheathing in a home at any given time was a function of how much water had previously penetrated around the windows and door

openings, but damage was occurring each time water infiltrated into the exterior wall system.

Cannon also testified that, within twelve to eighteen months of construction, the sheathing in the homes became non-functional. He explained the constant influx of water eventually caused the sheathing to deteriorate to the point where it became structurally insufficient and non-functional. But the damage began with the first rainfall.

Cannon's rationale for choosing the time period of twelve to eighteen months as the time within which the sheathing became non-functional was as follows. After the damage manifested itself and the sheathing and other parts of the exterior wall system were replaced, damage to the new sheathing was observed in three homes just twelve to eighteen months later. The cause of the new damage was water infiltration, which was the result of failing to properly flash the windows when the sheathing was replaced.

Cannon reasoned that, because new damage occurred twelve to eighteen months after the new sheathing was put into place, the deterioration rate of the original sheathing had to have been twelve to eighteen months. However, he admitted he assumed the defects around the windows that permitted water infiltration remained unchanged since the original construction.

Defendants filed a motion seeking to bar Cannon's testimony at trial for various reasons. The argument defendants advanced relevant to the issues on appeal was that Cannon's opinion the "[water] damage likely began" within twelve to eighteen months after construction ended was unsupported by any facts and, therefore, was a net opinion.

The trial court agreed and entered an order barring Cannon from testifying about "the timing of the damage." Plaintiff's motion for reconsideration was denied. In its order, the court stated defendants' "previously granted motion to bar . . . Cannon's expert testimony as to the 12- to 18-month period for original damage is AFFIRMED[.]" In its decision, the trial court concluded Cannon's opinion the "damage" occurred within a twelve to eighteen-month period was not based on "fact and methodology" and, thus, was an inadmissible net opinion.

II

On appeal, plaintiff argues the opinions Cannon expressed in his report and deposition were adequately supported by the facts and thus were not net opinions.

Defendants contend Cannon's assumption the "water damage occurred within 12-18 months . . . [is] dependent on two assumptions: (1) the building conditions (i.e., the flashing, wrap and other waterproofing) were the same following initial

construction and following the initial failed repair and (2) the weather conditions were identical during the respective periods." Defendants argue because Cannon did not provide facts to support the building and weather conditions were the same during the two subject time periods, his opinion is net and must be barred.

"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.'" Townsend v. Pierre, 221 N.J. 36, 53-54 (2015) (quoting Polzo v. Cty. of Essex, 196 N.J. 569, 583 (2008)). "Simply put, the net opinion rule 'requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion.'" State v. Townsend, 186 N.J. 473, 494 (2006) (quoting Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002)). The witness's conclusions can be based on his qualifications and personal experience, with or without citation to academic literature. Id. at 495.

We do not have a copy of plaintiff's complaint, but defendants' brief informs us plaintiff is asserting the continuous trigger theory, see Air Master & Cooling, Inc. v. Selective Ins. Co. of Am., 452 N.J. Super. 35, 48 (App. Div. 2017). As we observed in Air Master, "[p]roperty damage within

a building can be latent and undetected, behind walls and above ceiling tiles, and can gradually worsen and advance over time The progressively-worsening nature of a variety of construction defects, such as water infiltration or mold, logically support the application of the continuous-trigger doctrine." Ibid. Thus, coverage may be in order if a loss or damage continuously occurs from the time of the incident to the manifestation of the loss or damage.

Specifically, plaintiff is contending that as a result of its subcontractors' faulty construction, the houses were immediately damaged after construction was completed in 2000 and 2001 and continued to sustain new damage until the water infiltration problem manifested itself in 2007 or 2008. The defects in the subcontractors' work caused the ongoing infiltration of water into the exterior wall system of each home, causing each home to sustain ongoing, progressive damage.

We note Cannon's reference to the twelve to eighteen month time period has been continuously mis-cited. This particular time period refers only to the period within which the sheathing in the homes became non-functional, not to when the sheathing was damaged. Cannon made it clear the damage to the sheathing began after the first rainfall and new damage was inflicted every time water infiltrated into the exterior wall system.

That opinion was not in any way eroded during his deposition and there is no basis to find such opinion is net.

Specifically, there is evidence upon which an expert may rely showing that when the homes were first constructed, there was no or very inadequate flashing around the windows, allowing water to ultimately penetrate and damage the sheathing. That it is well-documented in the scientific literature water corrodes the kind of sheathing at issue here was not even challenged by defendants.

However, we do agree Cannon's claim the sheathing became non-functional within twelve to eighteen months of construction is a net opinion. Cannon conceded he does not know if, after the sheathing was repaired, the defective or non-existent flashing around the windows remained the same as when the houses were originally built.² If not, that could mean different amounts of water were infiltrating into the wall systems and causing the sheathing to deteriorate at different rates.


The order under review bars Cannon's "expert testimony as to the 12- to 18-month period for original damage." The problem with this order is it precludes testimony Cannon should not be prohibited from providing. Although he cannot provide testimony

² We did not find in Cannon's deposition transcript where he allegedly said the weather conditions during the two periods under review were the same.

the sheathing became non-functional within twelve to eighteen months of construction, there is no reason to limit his testimony about other damage that occurred to the sheathing or any part of an exterior wall system in any of the subject homes, and when such damage took place.

Reversed.

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


CLERK OF THE APPELLATE DIVISION