SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3310-15T4

MARCO BIANCHI,

Plaintiff-Appellant,

v.

BORIS LADJEN, NADIA LADJEN, MAIN STREET TITLE & SETTLEMENT SERVICES, LLC, and ANDREW G. FREDA, ESQ.,

Defendants-Respondents.

Argued March 5, 2018 – Decided April 23, 2018

Before Judges Sabatino, Ostrer and Rose.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3010-14.

Adam S. Tuttle argued the cause for appellant.

John Burke argued the cause for respondents Boris and Nadia Ladjen (Burke & Potenza, PA, attorneys; John Burke, of counsel and on the brief).

Robert G. Ricco argued the cause for respondent Main Street Title & Settlement Services, LLC (Nazor Cengarle & DeCarlo, LLC, attorneys; Robert G. Ricco, on the brief).

Andrew G. Freda, respondent, argued the cause pro se.

Robert H. Solomon argued the cause for amicus curiae New Jersey Association for Justice (Nagel Rice, LLP, attorneys; Bruce H. Nagel, Robert H. Solomon, and Michael J. Paragno, on the brief).

Diana C. Manning argued the cause for amicus curiae New Jersey State Bar Association (New Jersey State Bar Association, attorneys; Robert B. Hille, of counsel and on the brief; John W. Kaveney, Diana C. Manning, and Evelyn R. Storch, on the brief).

Michael J. Fasano argued the cause for amicus curiae New Jersey Land Title Association (Davison, Eastman, Muñoz, Lederman & Paone, PA, attorneys; Michael J. Fasano, on the brief).

PER CURIAM

This property damage case arises from a situation in which pipes froze in a residence during a period of cold weather and damaged the premises. The damage occurred at some undetermined time between the plaintiff homebuyer's "walk through" the morning of the scheduled closing and his post-closing entry into the house seven days later.

The closing was not completed on its scheduled date, due to the buyer's failure to wire the purchase funds in advance. Consequently, the parties signed an escrow agreement drafted by the title agent, delaying the buyer's possession of the house keys and the deed until his payment checks cleared.

Plaintiff sued the sellers, his real estate attorney, and the title agent, asserting various theories of breach of contract, negligence, and professional malpractice. The trial court granted all defendants summary judgment, a decision which we now affirm.

I.

Many of the pertinent facts are undisputed. Plaintiff Marco Bianchi, an electrician by trade, was living with his parents in 2013. In the fall of 2013, plaintiff entered into a contract to purchase a single-family residence in Glen Rock from defendants Boris and Nadia Ladjen. The sales contract, which was dated October 24, 2013, specified a cash purchase price of $360,000. No mortgage loan by the buyer was involved.

Plaintiff and the Ladjens utilized the services of a dual real estate agent, Elizabeth Fernandez, in connection with the transaction. Plaintiff retained a real estate attorney, defendant Andrew G. Freda, to represent him in the sale. The Ladjens retained their own counsel, Albert Ferro. Defendant Main Street Title & Settlement Services, LLC ("Main Street Title"), served as the title company for the transaction.

Among other things, the sales contract stated that the balance of the purchase price, less the initial deposit and an interim payment, "shall be paid by cash, certified check or Attorney's Trust Account check on delivery of a bargain & sale [deed] . . .

Payment of the balance of the purchase price by the Buyer and delivery of the deed and affidavit of title by Seller occur at the 'Closing'." (Emphasis added). As we will discuss, infra, the contract also specified that the Ladjens as sellers bore the risk of loss at the premises up through the time of closing. However, they did not contractually guarantee the premises' condition after the closing, and the deed and affidavit of title had been delivered to the buyer.

After an initial closing date was postponed, the closing was rescheduled to Tuesday December 31, 2013, at the offices of Main Street Title. That morning, plaintiff did a "walk-through" of the house and reported no damages or problems. At his later deposition, plaintiff specifically recalled the heat was working that morning within the house. The house had a steam heat system requiring water be supplied to the furnace in order for it to function. During periods of cold weather, the water supply to the furnace needed to be manually replenished periodically. As described in this record, the furnace had two on/off switches: one on the furnace itself and another on a stairwell wall.

On December 31, plaintiff brought to the scheduled closing one or more certified checks[1] made payable to Main Street Title,

[1] The record is inconsistent as to whether plaintiff presented a single check or multiple checks.

despite alleged instructions by Freda to wire the money before closing. The closing was attended by plaintiff; the Ladjens; a representative of Main Street Title; Freda; the Ladjens' attorney's assistant; and a colleague of Fernandez from the realtor's office.

Plaintiff had not, as instructed, wired the payment funds to Main Street Title's account in advance of the closing session. Consequently, the parties decided to enter into an escrow agreement to cover the interim period of time for the funds to clear. The simple escrow agreement, which was typed on Main Street Title's letterhead, read as follows:

> All closing proceeds to be held in escrow by Main Street Title until the funds clear. All under signed [sic] parties hereby agree to this.
>
> /s/ Marci Bianchi
> /s/ Boris Ladjen
> /s/ Nadia Ladjen

In a handwritten insert placed after the words "closing proceeds," the parties added and initialed these words: "Deed & Keys."

The escrow agreement was signed by plaintiff and the Ladjens. It was not signed by Main Street Title, the realtor, or either of the parties' attorneys.

Despite the language of the written escrow agreement, the Sellers handed the keys to Freda, who held them pending the

clearance of the checks. The parties separated that afternoon. The following day was a holiday, New Year's Day.

The witnesses' accounts of what occurred thereafter varied to some extent. Plaintiff testified at his deposition that, when he left Main Street's office on December 31, there was a "verbal discussion" that, once the checks cleared, Freda "was supposed to receive a phone call saying that everything had cleared, and that the keys could be handed over, and everyone could be paid."

Plaintiff testified that, on Thursday January 2, 2014, his father called Freda, who, in turn, called Main Street Title to ask if the checks had cleared. Although plaintiff's testimony on this subject is unclear, it appears that Freda called Main Street Title at some point between January 2 and January 6. A representative of Main Street Title thereafter returned Freda's call, and told him the checks had cleared.

Plaintiff testified that he obtained the keys from Freda on January 7, and went that day to the house. At that point, plaintiff saw ice outside of and throughout the dwelling. According to plaintiff, he went to the basement to turn the water off, at which point he realized "[t]he lid to the furnace was off, and the switch, the electrical main shutoff switch, was off."

Fernandez, the dual real estate agent, testified at her deposition about a text exchange she had with plaintiff on January

2 and January 4. The text messages were made part of the summary judgment record. On January 2, Fernandez sent plaintiff a text at 9:13 a.m. inquiring, "Did you get the keys yet? Do you want me to pick the[m] up for you if not?" Plaintiff did not respond immediately. He did so at 5:37 p.m. on January 4, replying in a text to Fernandez, "Hi Beth. That shouldn't be necessary. Thank you anyway[.]"

Fernandez further testified that Boris Ladjen asked her, on January 5, 2014, to contact plaintiff and remind him to put water in the furnace. Fernandez then sent plaintiff a text message that read: "The previous owners of your home called. Boris is concerned that the boiler needs water. He doesn't want it to stop working for you. Just passing along the m[e]ssage. Hope he doesn't stalk the house. LOL." There is no evidence that plaintiff responded to that January 5 text message.

According to Fernandez, plaintiff called her on January 7, after seeing the water damage to the property, to find out if the Ladjens had turned off the furnace. After confirming with the Ladjens that they had not turned off the furnace, Fernandez sent a text message to plaintiff that read:

> I just spoke to Boris. On the contrary, he said he left the furnace on and he would never turn it off in the winter. I would be very angry with my attorney if I were you because he's lying to you if he told you we only closed

> today. Everything was closed and finalized last Thursday [January 2, 2014]. You should have had the keys and been checking on that house. I would have been doing it for you if I picked them up Thursday.

At his deposition, Freda described himself as a solo practitioner with a "[g]eneral practice." Freda noted that he did "[n]ot normally" handle real estate transactions, but had "probably" handled "dozens" in the past five years. Freda stated that he knew plaintiff's father, although he had never represented plaintiff before.

Freda stated that plaintiff did not take title to and possession of the property on December 31 at the scheduled closing. According to Freda, both he and a representative from Main Street Title had told plaintiff prior to the closing that he should "have the funds [due at closing] wired to Main Street[Title's] account from his bank." Freda recalled that he was therefore "annoyed" when plaintiff showed up at the closing with certified checks, because Freda "had been very clear" in advance that plaintiff should instead wire the funds.

According to Freda, because plaintiff brought checks to the closing, the parties agreed that "all of the trappings of the closing," including the signing of papers and exchanging of HUD-1

statements, would occur at that time.[2] However, as Freda understood it, the "actual title" would not transfer until the funds had cleared. According to Freda, Main Street Title was supposed to notify him when the funds cleared. In the interim, he kept the keys to the Property, while Main Street Title kept the deed.

Freda testified that he spoke with someone from Main Street Title on January 6, 2014, and was informed that "it was finished, we could close the escrow." Although Freda acknowledged it was his obligation to ensure that the deed was recorded, he had engaged Main Street Title as the "settlement agent," which was then responsible for doing so.

According to Freda, he reached out to plaintiff on January 6 to let him know the transaction was finished, although it is unclear if he actually spoke to plaintiff that day. Freda testified that he received a call from plaintiff the following day, January 7, at which point he learned of the damage to the property.

[2] Freda referred to this as a "dry closing," in which all other items were completed and the parties were "just waiting for one box to be checked." According to Freda, "escrow agreements," by contrast, typically require "additional tasks" that the parties must complete.

With respect to homeowner's insurance, Freda stated that he "assume[d] at the time the property closed, [plaintiff] would be able to go out and obtain [such] insurance." He explained that in real estate transactions involving a mortgage, the lender will typically require that the purchaser obtain insurance before the lender will release the funds.

Freda testified that he had "no doubt" he discussed insurance with plaintiff prior to closing, although he could not recall "a specific meeting or conversation . . . ." Plaintiff did not, however, provide Freda with proof of casualty insurance. Freda testified that he "assumed" plaintiff had a policy.

Bryan Nazor, Esq., President of Main Street Title, was also deposed. Nazor testified that his firm was hired to perform both title and settlement services in this realty transaction. Nazor explained that, because no mortgage lender was involved, Main Street Title "followed [the] direction of buyer's counsel and seller's counsel as to how the settlement should proceed." Nazor testified that Main Street Title's responsibilities included "tak[ing] the money in, disburs[ing] the money according to the parties' agreement, prepar[ing] documents for the parties, and post closing record[ing] documents." He acknowledged that his office drafted the written escrow agreement in this case.

According to Nazor, Main Street Title's "policy" is that it "prefer[s]" a buyer wire funds prior to closing. He explained his firm typically conveys to the buyer's attorney that the buyer must wire those funds. He could not, however, confirm how that occurred in the present case.

The Ladjens also were deposed. Boris Ladjen testified that he and his wife did not keep keys to the Property after the December 31 attempted closing. He further acknowledged that they did not receive any of the proceeds from the sale at the December 31 session.

According to Boris Ladjen, he went "[e]very second day" to check on the property before the scheduled closing, particularly to check the heater. When asked who was going to "look after" the property between the closing and when the funds cleared, Mr. Ladjen responded, "No one."

Nadia Ladjen testified that, although her husband had learned from Fernandez that the property had sustained water damage after January 31, she was not aware of the problem until they received notice of the present lawsuit.

Both Ladjens denied entering the house after December 31. They also denied that they had provided an extra set of keys to anyone else.

Plaintiff obtained expert reports from a real estate attorney to support his legal malpractice claims against Freda, and a title expert to support his professional liability claims against Main Street Title. After receiving those expert reports, defendants moved for summary judgment and also to bar the experts' testimony as improper net opinion.

Following oral argument, the trial court issued a written opinion barring both of plaintiff's experts and granting summary judgment to each of the defendants. This appeal by plaintiff ensued.

During the course of the briefing on appeal, we invited and received amicus briefs from the New Jersey Association for Justice ("NJAJ"), the New Jersey Land Title Association ("NJLTA"), and the New Jersey State Bar Association ("NJSBA"). The amici also helpfully participated in the oral argument on appeal.[3]

II.

In reviewing the many issues presented on appeal in this case, we are mindful of our scope of review. As to the evidentiary ruling to bar plaintiff's experts, we apply considerable deference to the trial court. We generally do not disturb the trial court's decision on such matters unless the ruling demonstrably comprises

[3] The Attorney General's Office declined our invitation to participate.

an abuse of discretion. Hisenaj v. Kuehner, 194 N.J. 6, 16 (2008); see also Townsend v. Pierre, 221 N.J. 36, 52-53 (2015) (noting that the decision to admit or exclude expert testimony is "committed to the sound discretion of the trial court") (citing State v. Berry, 140 N.J. 280, 293 (1995)).

We afford less deference to the trial court's dispositive rulings on defendants' respective summary judgment motions. We review those determinations de novo on the same record as the trial court, evaluating whether, under Rule 4:46-2(c), "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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); see also IE Test, LLC v. Carroll, 226 N.J. 166, 184 (2016) (applying on appeal the identical summary judgment standards used by the trial court). We also review de novo the trial court's determinations on pure questions of law. Manalapan Realty, LP v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995) (noting that no "special deference" applies to a trial court's legal determinations).

A.

We first consider the trial court's dismissal of plaintiff's claims against the Ladjens, the sellers of the house. In essence,

those claims rest upon two distinct theories of liability: (1) the sales contract's allocation of the risk of loss upon the sellers until the "closing" of the transaction; and (2) plaintiff's factual contention that someone must have manually switched off the furnace between the December 31 morning walk-through and his entry into the premises on January 7. Neither theory is viable on this record, even affording plaintiff all reasonable inferences.

Paragraph 15 of the sales contract, entitled "Risk of Loss," plainly states, "The risk of loss or damage to the Property by fire or otherwise, except ordinary wear and tear, is on the Seller until the Closing." This provision is a customary term within the "Standard Form of Real Estate Contract" promulgated by the New Jersey Association of Realtors. The parties did not strike or modify this standard risk-of-loss provision. The escrow agreement they agreed to on December 31, before the purchase funds cleared, did not alter the sales contract's standard allocation of risk.

In paragraph 17 of the sales contract, the sellers agreed to maintain the property in "good condition" through the closing, subject to "ordinary wear and tear." They represented that "all . . . heating . . . systems . . . now work and shall be in proper working order at the time of Closing." The sellers further represented, to the best of their knowledge, that "there are

currently no leaks . . . in the . . . walls . . . ." However, Section 17 specifies, in bold and capitalized print,[4] that all of the sellers' representations "shall not survive closing of title." Additionally, the provision makes clear the sellers did not guarantee the condition of the premises "after the deed and affidavit of title have been delivered to the Buyer at the 'Closing.'" (Emphasis added).

Plaintiff contends that the pipes in the house must have burst before "the closing" and, therefore, the risk of that damage was contractually borne by the Ladjens in their capacity as sellers. The trial court rejected that argument. So do we, albeit based upon slightly different reasoning.

Although it repeatedly uses the term "the closing," the sales contract does not define the concept or pinpoint when exactly that event occurs. In common usage, the term has long been used to refer to the time when title to real estate passes from a seller to a buyer. See, e.g., Pyle v. Altshul, 125 N.J. Eq. 143, 144 (E. & A. 1939) (referring synonymously to "the time of passing title" and "the time of closing title"); Samuel A. Laden, Inc. v. Lidgerwood Estates, Inc., 15 N.J. Misc. 498 (Sup. Ct. 1937) (construing the contract phrase "at the time of the delivery of

[4] We have omitted displaying the bold face type and capitalization for ease of the reader.

the deed and the closing of title" to signify a definitive "designation of time"). The closing, sometimes referred to as the "settlement," represents "the end of the transaction" in a real estate sale. In re Opinion No. 26 of the Comm. on the Unauthorized Practice of Law ("Opinion No. 26"), 139 N.J. 323, 327 (1995).

As described by the Supreme Court, "[t]the day for closing" entails a meeting of the buyer and seller, their attorneys (if any),[5] and a title officer. Id. at 338. "The funds are there. And the critical legal documents are also on hand . . . ." Ibid. In cash transactions where, as here, the buyer is not obtaining a mortgage loan, those "critical legal documents" include a deed, an affidavit of title, a settlement statement reflecting "how much is owed, what deductions should be made for taxes and other costs and what credits are due[,]" and a final title binder. Ibid. At the closing, "all" of these documents are "executed and delivered, along with other documents, and the [purchase] funds are delivered or held in escrow until the title company arranges to pay off prior mortgages and liens." Ibid.

In the present case, nearly all of these steps were accomplished when the parties and the title agent convened on

[5] In the so-called "South Jersey practice," the buyer and seller are ordinarily not represented by counsel, in contrast to the so-called "North Jersey practice," in which most buyers and sellers have an attorney. Id. at 333.

December 31. However, as we have already described, the checks for the purchase funds had not yet cleared. Consequently, a terse escrow agreement was prepared on the spot by the title agent and executed by the parties. As we have noted, the escrow agreement specified that "[a]ll closing proceeds," plus the deed and the keys to the house, were "to be held in escrow by Main Street Title until the funds clear."

The trial court found that, even though plaintiff was not given physical possession of the deed on December 31, "title had passed with the [sellers'] execution of the deed." We respectfully differ with the court on this discrete point. If, for some reason, the plaintiff's checks did not clear through the banking system and the purchase funds were not duly transferred, the transaction would not have been consummated and title would have remained with the sellers. The closing therefore was not complete on December 31. Instead, it was subject to the conditions of the escrow.

We do agree with the trial court's observation, however, that the Ladjens had "satisfied their obligation as sellers of the Property by providing the keys and signing over the deed" on December 31. Even so, the risk of loss on the premises continued with the Ladjens through the point in time when the checks for the purchase cleared.

The record does not disclose with certainty when the checks cleared. There is no evidence the funds cleared later in the day on December 31 or the following day, January 1 (New Year's Day), which is a bank holiday. We do know from the record, however, that the dual real estate agent, Fernandez, went to pick up and received her commission check on January 2. The sales contract specified in Section 27 that her commission was "due and payable at the time of the actual closing of title and payment by Buyer of the purchase consideration for the Property." In that same contract provision, the sellers authorized the "disbursing agent," here Main Street Title, to pay the full commission "out of the proceeds of the sale prior to the payment of any such funds to the Seller." (Emphasis added).

Thus, the real estate agent would not have been entitled on January 2 to receive her commission unless the checks for the proceeds had already cleared. Moreover, Mrs. Ladjen recalled receiving the sellers' check in the mail on January 3 or 4, which are dates consistent with the funds having cleared at least a day before then. We recognize that Main Street Title has no record of the exact date and time the funds cleared. However, there is no evidence that it disbursed the agent's commission or the sellers' net receipts prematurely.

Even viewing the record in a light most favorable to plaintiff, we conclude that the sale closed sometime on January 2. We reject plaintiff's contention that the closing did not occur until January 6 when his lawyer notified him of the availability of the keys, or January 7, when he entered the premises for the first time after the checks cleared.

The sellers had no control of plaintiff's timing. As the trial court aptly noted, they had completed all the tasks they were obligated to perform. It would be inequitable and illogical to hold that the risk of loss remained the sellers' burden after the funds had cleared. Instead, the risk of loss transferred to plaintiff by that point.

Given our premise that the risk of loss shifted to plaintiff on January 2, we next consider whether plaintiff has provided sufficient proof for a jury to reasonably conclude that the pipes froze and the water damage occurred before that critical point in time. We agree with the trial court that plaintiff has failed to do so with sufficient competent evidence.

Plaintiff did not retain an expert with an appropriate opinion showing that recorded outdoor temperatures on and after December 31 establish the pipes must have frozen on or before January 2. According to a printout of the United States Weather Report for Teterboro, New Jersey contained in the motion record, the

respective low outdoor temperatures on December 31, January 1, and January 2 were 27, 21, and 15 degrees Fahrenheit. The recorded low temperatures after January 2 were also subfreezing, specifically 8 degrees on January 3, 3 degrees on January 4, 13 degrees on January 5, 20 degrees on January 6, and 22 degrees on January 7.

Absent expert support, it is sheer speculation as to whether the pipes froze before the risk of loss transferred from the sellers, or afterwards. Claims must not go to a jury based on pure speculation. Merchants Express Money Order Co. v. Sun Nat'l Bank, 374 N.J. Super. 556, 563 (App. Div. 2005) (noting that mere speculation will not bar summary judgment); see also Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (similarly applying this principle). We therefore agree with the trial court that plaintiff has not presented a viable evidential basis to show proximate causation.

Plaintiff's alternative theory of the Ladjens' liability is his contention that, when he arrived at the house on January 7, he observed the heater had been shut off and its front panel had been removed. This claim is not corroborated by any other evidence. To the contrary, the Ladjens insisted at their deposition that they turned over their keys to the house on December 31 and did not retain any duplicate keys. They deny

entering the premises or touching the heater at any time after December 31, when plaintiff walked through the house and detected no problems with the heater.

Plaintiff conjectures that one or both sellers, or perhaps someone on their behalf, entered the premises after the December 31 walk-through and shut off the heat. But there simply is no direct evidence they did so, nor any competent circumstantial evidence supporting such a nefarious inference of tampering. No witness saw either Mr. Ladjen or Mrs. Ladjen enter the house after December 31. Nor is there any document or statement by either of them substantiating they did so.

In fact, the record shows the Ladjens urged plaintiff through the real estate agent Fernandez to make sure that adequate water was maintained in the heater to keep it running. This is corroborated by Fernandez's January 5 text message exchange with plaintiff. It is unrealistic to believe that the Ladjens would have deliberately shut off the heater in the midst of very cold weather, knowing from their experience as owners that doing so could cause damage. The marginal savings on the utility bill[6] for

[6] Indeed, there is no indication in the appendices that the Ladjens were charged or agreed to pay for continued fuel costs after December 31.

a few days would hardly have been worth the risk of causing such damage.

Although we are mindful of the court's responsibility in summary judgment to afford the non-moving party all reasonable inferences of fact, Brill, 142 N.J. at 540, there are no reasonable inferences in the present record to create liability for these sellers.

We may never know exactly how or why the heater ceased operating in this house between December 31 and January 7. But that unknown cause cannot justify imposing liability upon these sellers. Summary judgment was appropriately entered in their favor.

B.

Plaintiff also seeks reversal of the trial court's grant of summary judgment to his former attorney, Freda, and its dismissal of his claims against Freda for legal malpractice. We reject his arguments, although not for all of the reasons stated in the trial court's decision.

Fundamentally, plaintiff's theories of legal malpractice allege that Freda failed to discharge the duties of care owed by a lawyer to a purchaser of residential real estate in New Jersey. As we have noted, plaintiff obtained a supporting expert report from an attorney who had represented "several thousand" buyers and

sellers of real estate in this State, and who had conducted "several thousand" title and purchase closings.

The expert asserted that an attorney representing a buyer in a real estate transaction in New Jersey has the "duty to advise, guide and protect the interest of his client throughout the purchase transaction." According to the expert, this responsibility "includes the duty of the attorney inter alia to advise and counsel the buyer to obtain appropriate casualty and liability insurance on the real property premises being purchased and the potential risks of not obtaining suitable casualty insurance coverage." The expert opined that Freda's alleged failure to do so in this transaction thus "deviated and failed to conform to acceptable professional standards for an attorney at law in New Jersey . . . ."

In its written decision granting summary judgment, the trial court acknowledged plaintiff's legal malpractice expert had reviewed numerous documents before rendering his opinions. However, the court found those opinions were "devoid of any objective standard of care in which to measure Mr. Freda's conduct to determine whether he deviated from said standard of care." The court therefore found that the report amounted to an inadmissible net opinion, and thus could not sustain plaintiff's legal malpractice claims.

Additionally, the trial court more broadly concluded that it was "not satisfied that any expert report could impose such liability upon an attorney who represents a buyer in a residential closing." According to the trial court, "[t]he obligation which Plaintiff seeks to impose upon his counsel [is] beyond the scope of representation for contracting and closing title on property."

To prevail on a legal malpractice claim, a plaintiff must prove: "'(1) the existence of an attorney-client relationship creating a duty of care upon the attorney; (2) the breach of that duty; and (3) proximate causation.'" Conklin v. Hannoch Weisman, 145 N.J. 395, 416 (1996) (quoting Lovett v. Estate of Lovett, 250 N.J. Super. 79, 87 (Ch. Div. 1991)). As part of that burden, the plaintiff must show the attorney charged with malpractice owed and in fact breached a specific duty to his client.

As a threshold question, we must consider whether the scope of an attorney's duties in representing a buyer in a residential real estate purchase is a question of law for the Judiciary or, instead, a question that is a proper subject of competing expert opinions to be presented to a trier of fact. This predicate institutional question arises because of the unique role the Judiciary performs in our State in regulating the practice of law.

Article VI of the New Jersey Constitution declares that "[t]he Supreme Court shall have jurisdiction over the admission to the

practice of law and the discipline of persons admitted." N.J. Const., art. VI, § 2, ¶ 3. The Rules of Professional Conduct promulgated by the Court govern attorney conduct. Those Rules in particular require that an attorney act with competence, RPC 1.1, and diligence, RPC 1.3. However, an attorney's violation of an RPC does not per se create a viable claim for legal malpractice. Baxt v. Liloia, 155 N.J. 190, 200 (1998) (citing Albright v. Burns, 206 N.J. Super. 625, 634 (App. Div. 1986)).

The RPCs instead establish "'the minimum level of competency which must be displayed by all attorneys.'" Ibid. (quoting Albright, 206 N.J. Super. at 634). The presence or absence of a duty, based on that minimum level of competence, is "generally a question of law for the court." Estate of Spencer v. Gavin, 400 N.J. Super. 220, 240 (App. Div. 2008) (citations omitted). "The court's role in defining the contours of a legal duty is particularly important in the context of attorney conduct, as our State judiciary, since 1947, has exercised exclusive constitutional authority over the practice of law." Ibid. (emphasis added) (citing N.J. Const., art. VI, § 2, ¶ 3).

The existence and contours of a lawyer's duty are matters of fairness, involving "a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." Ibid. (quoting Goldberg v. Housing Auth. of Newark,

38 N.J. 578, 583 (1962)). "The scope of a lawyer's potential duty essentially has two facets: (1) the persons or entities to whom that duty is owed, and (2) the conduct required of the lawyer to fulfill the duty." Id. at 241.

To some extent, the duties of attorneys who practice in this State are prescribed by ethics rulings and judicial opinions. For example, in the present setting of a residential real estate purchase, the Supreme Court in Opinion No. 26, 139 N.J. at 323, spelled out various common functions of a New Jersey real estate attorney in evaluating whether title agents participating in "South Jersey"-style real estate closings have been engaged in the unauthorized practice of law. Those functions include, for example, an attorney's opportunity to review the terms of the signed real estate sales contract during the so-called three-day "attorney review period," during which time the contract may be cancelled. Id. at 349, 355-56 (discussing the attorney review clause). The Court further instructed that "an attorney retained by the [real estate] broker to draft a deed and/or affidavit of title for the seller may do so but only if the attorney personally consults with the seller . . . ." Id. at 359.

Although the Court in Opinion No. 26 allowed the South Jersey practice to continue, it stressed that it did "not in any way cede its power over the practice of law." Id. at 361. The Court also

stressed in Appendix A of Opinion No. 26 that the form notice utilized in such real estate transactions make explicit that the real estate broker, the title company nor any of its officers "are allowed to give the seller or buyer any legal advice." Id. at 362.

That said, the Judiciary's regulatory authority has not preemptively "occupied the field" to dictate with precision, at a "micro" level, each and every duty of a real estate attorney. Instead, the Court has permitted the standards of care to be shaped, to some extent, by the legal profession itself through the development and continuation of prevailing customs and practices.

More generally, the Court has approved model jury charges to be used in legal malpractice cases. Those model charges envision that, at a legal malpractice trial, experts for plaintiffs and defendants will express competing opinions about the standards of care of attorneys and whether they were breached in a particular case. As the model charges explain, "[t]he law . . . imposes upon an attorney the duty or obligation to have and to use that degree of knowledge and skill which attorneys of ordinary ability and skill possess and exercise in the representation of a client . . . ." Model Jury Charges (Civil), 5.51A, "Legal Malpractice" (approved June 1979). In other words, the "attorney is obliged to use his/her knowledge, skill and judgment in an

effort to perform the work he/she undertakes according to standard legal practice." Ibid. A jury "must determine what is the standard legal practice from the testimony of the expert witnesses who have been heard in this case." Ibid.

The trial court's decision in this case categorically declared, among other things, that no qualified expert could permissibly support plaintiff's legal malpractice theories of liability in this case. As the trial court wrote:

> Furthermore this [c]ourt is not satisfied that any expert report could impose such liability upon an attorney who represents a buyer in a residential closing. The obligation which Plaintiff seeks to impose upon his counsel [is] beyond the scope of representation for contracting and closing title on property.
>
> [(Emphasis added).]

We decline to adopt these categorical declarations. Unlike the trial court, we do not rule out the possibility of reasonable disagreement among qualified legal experts about whether the standards of care for a buyer's attorney include an obligation to advise a client of the importance of obtaining homeowner's insurance when the buyer takes title to the property. There is also legitimate room for debate over whether the standards of care at least entail a duty on the part of the buyer's attorney to alert his or her client about the significance and meaning of the contract documents and what legal responsibilities will flow to

the buyer, including the risk of loss at the point in time when the title passes.

No legal ethics opinion or published case law to date has pronounced whether or not such duties exist, and we decline to make such categorical pronouncements here. Instead, the precise standards of care on this subject are within the zone of fair dispute for a jury to evaluate, provided that the plaintiff presents sufficient and competent expert opinion to support his or her contentions.

Instead of resting upon categorical proclamations, we focus on the trial court's separate dispositive basis for dismissing the legal malpractice claims: specifically that plaintiff's legal malpractice expert's report violates the "net opinion" doctrine and thus is inadequate to support plaintiff's cause of action against Freda. His claim is not one of "common knowledge" in which "the questioned conduct presents such an obvious breach of an equally obvious professional norm that the fact-finder could resolve the dispute based on its own ordinary knowledge and experience and without resort to technical or esoteric information . . . ." Brach, Eichler, Rosenberg, Silver, Bernstein, Hammer & Gladstone, PC v. Ezekwo, 345 N.J. Super. 1, 12 (App. Div. 2001) (citations omitted).

The doctrine barring the admission at trial of net opinions 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, 221 N.J. at 53-54 (alterations in original) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)). The net opinion principle mandates that experts "give the why and wherefore" supporting their opinions, "rather than . . . mere conclusion[s]." Id. at 54 (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)).

The Supreme Court recognizes that "[t]he net opinion rule is not a standard of perfection." Ibid. It does not require that experts organize or support their opinions in a specific manner "that opposing counsel deems preferable." Ibid. Consequently, "[a]n expert's proposed testimony should not be excluded merely 'because it fails to account for some particular condition or fact which the adversary considers relevant.'" Ibid. (quoting Creanga v. Jardal, 185 N.J. 345, 360 (2005)). An expert's failure "to give weight to a factor thought important by an adverse party does not reduce his testimony to an inadmissible net opinion if he otherwise offers sufficient reasons which logically support his opinion." Ibid. (quoting Rosenberg v. Tavorath, 352 N.J. Super. 385, 402 (App. Div. 2002)). "Such omissions may be 'a proper

"subject of exploration and cross-examination at a trial."'" Id. at 54-55 (quoting Rosenberg, 352 N.J. Super. at 402).

Even so, the net opinion doctrine does require experts to "be able 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)). An expert's conclusion should be excluded "if it is 'based merely on unfounded speculation and unquantified possibilities.'" Ibid. (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997)).

Given "the weight that a jury may accord to expert testimony, a trial court must ensure that an expert is not permitted to express speculative opinions or personal views that are unfounded in the record." Ibid. (emphasis added); see also Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 401 (2014) ("[T]he standard of care [the expert] set forth represented only his personal view and was not founded upon any objective support. His opinion as to the applicable standard of care thus constituted an inadmissible net opinion.") (emphasis added); Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 373 (2011) ("[I]f an expert cannot offer objective support for his or her opinions, but testifies only to a view about a standard that is 'personal,' it fails because it is a mere net opinion.").

To be sure, experts may base their opinions upon unwritten industry standards without violating the net opinion doctrine. See, e.g., Satec, Inc. v. Hanover Ins. Grp., 450 N.J. Super. 319, 333 (App. Div.) (noting that an expert's opinion may be based on unwritten "generally accepted standards, practices, or customs of the . . . industry.") (citing N.J.R.E. 702), certif. denied, 230 N.J. 595 (2017); Davis, 219 N.J. at 413 (quoting Kaplan v. Skoloff & Wolfe, PC, 339 N.J. Super. 97, 103 (App. Div. 2001)) (recognizing that the expert's conclusions might not have been inadmissible net opinion if he had referenced an "unwritten custom" of the industry).

Here, the report of plaintiff's legal malpractice expert, while detailed in certain respects, fails to point to any written or unwritten widely-accepted objective professional standards that impose a duty upon a home buyer's attorney to specifically urge the client to obtain insurance that becomes effective when title passes. The report essentially reflects that is the personal practice of the expert himself, whose experience in thousands of sales is no doubt considerable. What is missing is the extra ingredient required by Townsend, Davis, and the other series of net opinion cases, i.e., a demonstration that the alleged standard of care is a widely-accepted baseline requirement within the

profession at large. This critical gap in the report justifies the trial court's rejection of the expert's opinion.

The report's conclusory and generic assertion that the expert's "fully cognizant of acceptable and previously [sic] professional legal standards applicable to the representation of real estate clients" is inadequate. The precise deviations identified by the expert were never tied to any specific professional standards. The absence of such an express linkage renders the report a mere net opinion. We agree with Freda and the State Bar Association that the report cannot sustain plaintiff's claims of legal malpractice in this case.

We recognize that, in the briefing on this appeal, amicus NJLTA has cited to a portion of a treatise on New Jersey real estate transactions, which states that "[i]f there is no mortgage, the purchasers' attorney should advise their [sic] client to obtain adequate fire and casualty insurance coverage." 2 Arthur S. Horn & Edward C. Eastman, Jr., Residential Real Estate Law and Practice in New Jersey, § 9.4(f) (6th ed. 2008) (emphasis added). The treatise implies that if the mortgage lender does not require homeowner's insurance because there is no mortgage, then the buyer's attorney has an obligation to inform the buyer about the importance of such insurance. Ibid. But this source is not cited in plaintiff's expert's report. Moreover, the term "should" within

the treatise is, at best, ambiguous in establishing a mandatory duty.

We further recognize that, although there is no case law precisely on point, in Stoeckel v. Township of Knowlton, 387 N.J. Super. 1, 14-15 (App. Div. 2006), we reversed summary judgment dismissing a legal malpractice claim in a case where the plaintiff's expert had opined the purchaser's attorney breached duties to "advise him of the risks of closing title to the lot under the circumstances as existed at the time of the closing[,]" "to determine the full extent of the risk," and to "advise or inform his client of what had to be done to protect his interest . . . ." Plaintiff's expert does not refer to Stoeckel in his discussion of the standards of care. In any event, Stoeckel is not squarely on point because it does not specifically concern a buyer's attorney's failure to advise a client to obtain homeowner's insurance.

Amicus NJAJ argues that the trial court was obligated to conduct a Rule 104 hearing, with testimony by plaintiff's expert, before rejecting his conclusions as inadmissible net opinion. We decline to adopt that per se position. Although the Supreme Court has advised that it may be the "sounder practice" to conduct such Rule 104 hearings with testimony, see Kemp v. State, 174 N.J. 412, 432-33 (2002), the Court has yet to mandate such proceedings as

an absolute requirement. Moreover, because this point is advanced by only an amicus, we decline to pass upon it and defer instead to the Court's ultimate guidance on the subject. See, e.g., Townsend, 221 N.J. at 54 n.5 (in which a similar Rule 104 per se argument had been made by NJAJ as amicus, and the Court declined to address it).

Beyond these considerations, we have grave doubts about whether plaintiff reasonably could establish causation, even if his legal malpractice expert's views were admissible. The sales contract specifically contained a notice urging that the buyer "should obtain appropriate casualty and liability insurance for the Property[,]" and "urged [the buyer] to contact a licensed insurance agent or broker to assist [him] in satisfying [his] insurance requirements." Given that plain language, the buyer already was on notice of the importance of arranging to have the premises insured once he took ownership. The additive impact of an attorney echoing the contract's admonition is unclear at best.

Moreover, there are formidable problems of proximate cause here with respect to the unproven timing of the pipes freezing. We agree with the trial court the lack of expert opinion to delineate the likely timing of the rupture is yet another reason to uphold summary judgment. Even giving plaintiff all reasonable inferences from the record, it is highly speculative that events

would have unfolded any differently, if the buyer's attorney had provided more advice about insurance.

For these many reasons, we conclude the trial court did not misapply its discretion in excluding the net opinions of plaintiff's legal malpractice expert and likewise did not err under the Brill standard, in granting Freda summary judgment.

C.

Lastly, we turn to the trial court's grant of summary judgment to Main Street Title.

Plaintiff's claims of liability against Main Street Title are predicated on a theory that, as title agent to the transaction, the firm owed him as buyer of the realty certain legal duties and breached those duties. More specifically, plaintiff contends that Main Street Title violated standards of care for title agents by: (1) drafting an inadequate escrow agreement at the December 31 closing session, and (2) failing to notify him or his attorney sooner when the purchase funds had cleared. We agree with the trial court that these claims should not go to a jury in this case.

To proceed against Main Street Title, plaintiff obtained an expert report from a licensed title producer. The expert stated he has served as a settlement agent in over two thousand residential purchase and refinance transaction. For purposes of

our analysis, we accept that the expert has sufficient knowledge, training, education, skill, and experience to be qualified to render expert opinions in this field under N.J.R.E. 702.

Plaintiff's title expert generally explained in his report that, at a residential closing, the settlement agent "controls the purchase transaction and the disbursement of closing funds . . . ." According to the expert, when there is a delay in the purchaser obtaining possession of the property, the settlement agent "routinely and normally" prepares a written escrow agreement that "set[s] forth the responsibilities and duties of the Buyer and Seller until possession is given to the Buyer."

Plaintiff's title expert opined that the escrow agreement prepared by Main Street Title, in this case, was "deficient in many significant and material respects." As to those alleged deficiencies, his expert stated:

> The length and duration of the escrow period was not set forth nor was the risk of casualty loss allocated between the Buyer and Seller during this escrow period set forth. There was no provision for limited access to the property for the Buyer or Seller or their real estate agent to check on the premises until the buyer received possession. The individuals to be noticed and the manner of notification was not provided for and [] considering that the closing occurred during a period of extended below freezing weather some form of limited access to check on the heat and the structure should have been provided for.

[(Emphasis added).]

The expert factually noted that, although the funds cleared earlier, Main Street Title did not notify Freda that plaintiff could take possession of the property until January 6, when Freda called to check on the status of the transaction.

The expert concluded that Main Street Title "deviated from the standard of care for settlement agents in New Jersey" by: (1) not "timely notifying" Freda that he would release the keys to plaintiff, and; (2) failing to provide in the escrow agreement for "performance events" and "potential contingencies[.]"

The trial court ruled that plaintiff's title expert's criticisms were insufficient to support a viable cause of action against Main Street Title. In particular, the trial court found that his report "fails to establish or rely upon a bona-fide standard of care[,]" but instead "merely recites the alleged facts of the case and includes a conclusion that Main Street[Title]'s conduct was the cause of the loss."

The court found that the expert's report does not establish "any duty or breach of such duty on behalf of Main Street [Title] as a matter of law." As the court reasoned, "Main Street [Title] owed no duty to the Plaintiff with regards to notifying the Plaintiff as Main Street [Title] was not contractually obligated to do so." The court further concluded that "[t]he duty to

allocate risk of loss for damage to the Property was [instead] determined by the real estate Contract[,]" which both parties signed.

We generally agree with the trial court's reasoning on these points, even affording plaintiff all reasonable inferences from the summary judgment record.

The presence or absence of an enforceable duty is generally a question of law for the court. Clohesy v. Food Circus Supermarkets, Inc., 149 N.J. 496, 502 (1997); see also Doe v. XYC Corp., 382 N.J. Super. 122, 140 (App. Div. 2005). "Whether a duty exists is ultimately a question of fairness." Goldberg, 38 N.J. at 583 (emphasis omitted). "The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." Ibid.; see also Pequero v. Tau Kappa Epsilon Local Chapter, 439 N.J. Super. 77, 89 (App. Div. 2015).

We concur with the trial court that plaintiff and his title expert failed to establish such legally enforceable duties breached by Main Street Title in this case. As the court rightly underscored, the risk of loss until the closing was completed was expressly allocated by the sales contract to the Ladjens as sellers. Once the funds cleared, the risk passed to plaintiff as the buyer. The title agent had no authority to alter that

allocation through an escrow agreement. Nor did the title agent, in his dual and neutral role, have the prerogative to draft an escrow agreement that would favor the interests of one party to the transaction over the other party. See generally Opinion No. 26, 139 N.J. at 337 (describing the title agent's role). At most the title agent might have suggested to the parties' counsel that they consider themselves negotiating specific terms to cover aspects of the escrow period. But there is no established legal obligation for the title agent to do so.

Although it is not vital to our analysis, we further agree with the trial court that the plaintiff's title expert's report essentially amounted to inadmissible net opinion. Townsend, 221 N.J. at 54. The expert pointed to no written industry standards. Nor did he expressly show that the various specific duties of a title agent he described have been widely adopted by others in this field. We recognize that one passage in the expert's report alludes to what other title agents "routinely and normally" do, but that sweeping reference is not amplified or substantiated.

Although this is a closer issue of net opinion than as to plaintiff's legal expert, we are not persuaded the trial court abused its discretion by excluding the title expert's opinions, particularly because those views go beyond the contractual allocation of risk and the title agent's designated neutral role.

We also are disinclined to endorse a novel theory of liability for title agents that could have a significant public policy impact, in the absence of the recognition of such proposed duties by the Supreme Court or regulatory authorities.

D.

The remaining arguments presented by plaintiff on appeal, to the extent we have not yet already addressed them, lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.