SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0651-21

JUAN CARLOS HERNANDEZ and LESLIE HERNANDEZ, his wife, per quod,

Plaintiffs-Appellants,

v.

BLOOMFIELD BELLEVILLE ASSOCIATES URBAN RENEWAL, LLC,[1] and M. LAPCZYNSKI LLC,[2] a/k/a ML MASONRY,

Defendants-Respondents,

and

SERG CONSTRUCTION, LLC,

Defendant,

and

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[1] Improperly pled as Bloomfield Belleville Avenue Associates Urban Renewal, LLC, and Garden Homes, Inc.

[2] Improperly pled as M. Lapeznski, LLC.

BLOOMFIELD BELLEVILLE
ASSOCIATES URBAN
RENEWAL, LLC,

Defendant/Third-Party Plaintiff,

v.

M. LAPCZYNSKI LLC, a/k/a
ML MASONRY,

Third-Party Defendant,

and

M. LAPCZYNSKI LLC, a/k/a
ML MASONRY,

Third-Party Defendant/
Fourth-Party Plaintiff,

v.

SERG CONSTRUCTION, LLC
and LM INSURANCE
CORPORATION,

Fourth-Party Defendants.

Submitted October 25, 2022 – Decided December 29, 2022

Before Judges Messano, Gilson, and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-0853-18.

Ginarte Gallardo Gonzalez & Winograd, LLP, attorneys for appellants (John Ratkowitz, on the brief).

Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys for respondent Bloomfield Belleville Associates Urban Renewal, LLC (Frank J. Kontely, III, of counsel and on the brief).

Zimmerer, Murray, Conyngham & Kunzier, attorneys for respondent M. Lapczynski, LLC (Kevin J. Conyngham, of counsel and on the brief).

PER CURIAM

Plaintiff Juan Carlos Hernandez was injured when he fell from a scaffold while working as a mason at a construction site. He sued the general contractor and prime masonry contractor, relying on a safety expert to establish causation. The motion judge granted summary judgment to defendants, holding that plaintiff's expert could not testify because he was offering net opinions. Plaintiff appeals from the orders dismissing his claims and denying reconsideration. Because we agree that plaintiff's expert was seeking to offer net opinions that were not supported by evidence, we affirm.

I.

Defendants moved for summary judgment following the completion of discovery. Accordingly, we discern the material facts from the summary

judgment record, viewing them in the light most favorable to plaintiff, the non-moving party. See Richter v. Oakland Bd. of Educ., 246 N.J. 507, 515 (2021).

Plaintiff was injured on May 3, 2017, while he was working at a construction site owned by Bloomfield Belleville Associates Urban Renewal, LLC (Bloomfield Associates). Bloomfield Associates was the general contractor for the construction project, and it had hired M. Lapczynski, LLC, also known as ML Masonry (ML Masonry), as the prime masonry contractor. ML Masonry then contracted with Serg Construction which, in turn, hired ERJ Construction to install brick and precast stone. ERJ Construction was owned and managed by Juan Carlos Escobar, and plaintiff worked as a mason for ERJ Construction under Escobar's supervision.

At his deposition, plaintiff testified that he had arrived at the construction site at 7:00 a.m. on May 3, 2017. Escobar instructed plaintiff to work on a scaffold to install brick and stone to the side of a building. Plaintiff explained that he was working on the first level of the scaffold, which was approximately six feet off the ground. Plaintiff also explained that the scaffold consisted of planks supported by metal legs, the supports were spaced nine feet apart, and the planks were ten feet long. Thus, according to plaintiff's testimony, the planks extended six inches beyond the scaffold supports on each side.

Plaintiff worked on the scaffold for several hours. He testified that he felt the scaffold and planks were secure. At approximately 9:00 a.m., plaintiff walked towards the corner of the building and stepped on the edge of a plank. The plank tipped, plaintiff fell to the ground and injured his ankle.

Escobar testified that plaintiff and other ERJ Construction employees had erected the scaffolds at the construction site. According to Escobar, the scaffold supports were spaced eight feet apart and the planks were ten feet long. Therefore, the planks extended twelve inches beyond the scaffold supports on each side.

Escobar also testified that at the time of the accident, another scaffold, which was around the corner of the building from the scaffold plaintiff was working on, was being moved by two other employees of ERJ Construction. Escobar explained that the planks on the two scaffolds overlapped at the corner of the building, with one set of planks resting on the other planks. Escobar stated that the other workers had warned plaintiff that they were moving the second scaffold, but plaintiff did not heed that warning when he walked to the corner of the building and stepped on the edge of a plank, causing the plank to tip and plaintiff to fall.

Following his fall, plaintiff sued Bloomfield Associates, ML Masonry, and Serg Construction. Plaintiff, who received workers' compensation benefits for his injury, did not sue ERJ Construction. He alleged that his injuries resulted from defendants' failure to provide a reasonably safe place to work and to supervise and control the construction site. To support his claims, plaintiff retained William Mizel, CSP, a board-certified safety professional, as a liability expert.

Mizel submitted an expert report opining that Bloomfield Associates, as the general contractor, was responsible for the overall safety of the construction site and ML Masonry, as the prime masonry contractor, was responsible for the safety of their portion of the work on the construction site. Mizel identified several Occupational Safety and Health Administration (OSHA) regulations that required safety trainings and inspections and opined that Bloomfield Associates and ML Masonry had failed to conduct safety trainings and inspections in compliance with those regulations. Specifically, Mizel identified five OSHA regulations that Bloomfield Associates and ML Masonry had allegedly violated:

> 1. OSHA Section 1926.451(b)(5)(ii), prohibiting planks on a scaffold from extending more than eighteen inches beyond the scaffold supports unless there are guardrails blocking employees from accessing that section of the planks or the planks are designed and installed to support employees without tipping;

> 2. OSHA Section 1926.20(b)(2), requiring contractors to have an OSHA-competent person conduct regular inspections of the jobsite, materials, and equipment;
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> 3. OSHA Section 1926.21(b)(2), requiring contractors to instruct workers on the hazards associated with a construction project;
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> 4. OSHA Section 1926.451(f)(3), requiring an OSHA-competent person to conduct daily inspections of scaffolds before each work shift and after any occurrence affecting a scaffold's integrity; and
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> 5. OSHA Section 1926.454(a), requiring contractors to have a qualified person conduct safety trainings concerning scaffolds.[3]

Finally, Mizel opined that the proximate causes of plaintiff's fall were the OSHA violations and the lack of safety oversight and procedures at the construction site.

At his deposition, Mizel was questioned about the OSHA violations he had identified in his report. Mizel explained that the scaffold plaintiff had been working on was hazardous because the plank plaintiff fell from extended too far from the scaffold support. When asked how far the plank extended beyond the support, Mizel responded, "I have no idea." When asked to point to where in

[3] Mizel also opined that ERJ Construction similarly had failed to comply with some of the OSHA regulations he identified.

the record there was evidence that the plank had extended eighteen inches beyond the scaffold support, Mizel responded, "[t]hat [plaintiff] went to the edge and the plank went down and he fell. So that's pretty clear right there." Mizel acknowledged that he had not seen any pictures of the scaffold's set-up at the time plaintiff fell from it, taken any measurements of the planks or of the scaffold, or attempted to reconstruct how plaintiff fell. Moreover, Mizel acknowledged he never visited the construction site. Mizel also explained that he did not know how long the hazardous condition he identified had existed. In that regard, he conceded that the plank extending beyond eighteen inches could have been there for "thirty seconds, a minute, [or] five minutes" before plaintiff had fallen.

Mizel was also questioned about Escobar's testimony that plaintiff had been warned not to walk to the edge of the scaffold. In response, Mizel stated that he was aware of that testimony but asserted that if the scaffold had been set up improperly "they should have red-tagged it, they should not have allowed anybody" on the scaffold. Finally, Mizel acknowledged that plaintiff was not required to wear fall protection while working on the scaffold.

After the completion of discovery, all defendants moved for summary judgment. Plaintiff did not oppose the motion filed by Serg Construction, nor is he appealing from the order granting summary judgment to Serg Construction.

Bloomfield Associates and ML Masonry moved for summary judgment, contending that plaintiff's expert was offering net opinions, and the expert's proposed testimony should be barred. Defendants also argued that without an expert to testify about causation, plaintiff could not prove his negligence claims against them.

After hearing oral argument, the motion judge granted summary judgment to Bloomfield Associates and ML Masonry. In an oral decision, the judge found that plaintiff's expert was offering net opinions that were not supported by facts. Specifically, the judge found that Mizel identified only one OSHA violation concerning the scaffold itself. In that regard, Mizel sought to opine that the plank on the scaffold extended eighteen inches beyond the scaffold support in violation of an OSHA regulation. The judge reasoned that there was no testimony or evidence supporting the assertion that the plank extended eighteen inches beyond the scaffold support. The judge also reasoned that Mizel's opinions about other OSHA safety training and inspection regulations were not supported by any evidence that violations of those regulations had caused

plaintiff to fall from the scaffold. Accordingly, on June 14, 2021, and June 23, 2021, the judge entered orders granting summary judgment to Bloomfield Associates and ML Masonry and dismissing plaintiff's claims against those defendants with prejudice.

Plaintiff moved for reconsideration, arguing that the motion judge had failed to consider Escobar's testimony that one side of the support of the scaffold had been removed before plaintiff's accident and erred in concluding Mizel's opinions regarding violations of safety training and inspection regulations did not establish causation. After hearing argument, the motion judge denied reconsideration and entered memorializing orders on October 4, 2021, and October 5, 2021.

Plaintiff now appeals from the June 2021 orders granting summary judgment and dismissing his claims against Bloomfield Associates and ML Masonry. He also appeals from the October 2021 orders denying his motions for reconsideration.

II.

On appeal, plaintiff makes three arguments, contending that the motion judge erred in (1) denying his motion for reconsideration by failing to consider Escobar's testimony; (2) denying his motion for reconsideration by failing to

consider plaintiff's expert's opinions concerning safety lapses by Bloomfield Associates and ML Masonry and how those lapses had caused plaintiff's accident; and (3) granting the motions for summary judgment. We reject those arguments because the opinions offered by plaintiff's expert were net of facts that could establish causation. There was no evidence that the plank plaintiff fell from had extended eighteen inches beyond the scaffold support. In addition, there was no evidence that the other OSHA safety training and inspection violations identified by plaintiff's expert caused the accident.

A. The Net Opinions.

We analyze the motion judge's net opinions and summary judgment determinations based on the legal framework governing plaintiff's negligence claims and the material factual evidence concerning causation. "To sustain a cause of action for negligence, a plaintiff must establish four elements: '"(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages."'" Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Polzo v. County of Essex, 196 N.J. 569, 584 (2008)). "It is the plaintiff's burden to establish these elements 'by some competent proof.'" Gilbert v. Stewart, 247 N.J. 421, 443 (2021) (quoting Townsend, 221 N.J. at 51). "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.'" Ibid. (quoting Townsend, 221 N.J. at 51).

Plaintiff relied on Mizel, his liability expert, to establish causation. Consequently, the issue is whether Mizel was offering admissible expert testimony. Two rules of evidence frame the analysis for determining the admissibility of expert testimony. See N.J.R.E. 702; N.J.R.E. 703. Rule 702 identifies when expert testimony is permissible and requires the expert be qualified in his or her respective fields.

Rule 703 addresses the foundation for expert testimony. Expert opinions must "be grounded in '"facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts."'" Townsend, 221 N.J. at 53 (quoting Polzo, 196 N.J. at 583). "The net opinion rule is a 'corollary of [Rule 703]'" and it "'forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" Id. at 53-54 (quoting Polzo, 196 N.J. at 583).

Accordingly, an expert is required to "'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Crispino v. Township of Sparta, 243 N.J. 234, 257 (2020) (quoting Townsend, 221 N.J. at 54). The net opinion rule directs "that experts '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.'" Townsend, 221 N.J. at 55 (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992)). In short, "[t]he net opinion rule is a 'prohibition against speculative testimony.'" Ehrlich v. Sorokin, 451 N.J. Super. 119, 134 (App. Div. 2017) (quoting Harte v. Hand, 433 N.J. Super. 457, 465 (App. Div. 2013)).

Applying these principles, the motion judge correctly held that Mizel's proposed opinions were improperly based on assumptions without factual support in the record. Mizel opined that plaintiff's accident had been caused by two types of OSHA violations. The first type related directly to the scaffold. Mizel pointed to an OSHA regulation requiring that planks on a scaffold not extend beyond eighteen inches from the scaffold supports. The deficiency with that proposed opinion is that there was no evidence that the plank plaintiff was standing on when he fell extended beyond eighteen inches from the scaffold support.

Mizel admitted he had taken no measurements, had no contemporaneous pictures of the scaffold, nor had any other factual basis to establish that the plank extended eighteen inches beyond the scaffold support. Instead, Mizel simply assumed that because the plank had tipped when plaintiff walked to its edge, the plank must have extended eighteen inches beyond the support.

Beyond having no support for his opinion, Mizel's opinion diverged from the evidence. Plaintiff testified that the planks had extended six inches beyond the scaffold supports and Escobar's testimony reflects the planks extended twelve inches beyond. The difference between plaintiff's and Escobar's testimony is not material because neither testified that the planks extended to or beyond eighteen inches, which is the only OSHA standard identified by Mizel.

The second type of violations identified by Mizel, regarding OSHA regulations for trainings and inspections, also failed to support plaintiff's negligence claims. There is no evidence that safety trainings or inspections would have prevented plaintiff's fall. Escobar testified the scaffolds had been erected by ERJ Construction employees. There was no evidence that the scaffold plaintiff was standing on was not properly erected. In fact, plaintiff stated in his deposition he felt the scaffold and planks were secure. In other words, Mizel speculated that safety trainings or inspections might have

prevented the accident, but his opinion was not based on any factual evidence that safety trainings or inspections actually would have prevented the accident. As Mizel himself candidly admitted during his deposition, he simply assumed the scaffold was not properly set up because plaintiff tipped the plank and fell off.

Accordingly, we affirm the trial court's summary judgment ruling. Plaintiff's negligence claims depended on Mizel's opinions to establish causation. Because Mizel's opinions were improperly based on assumptions without factual support in the record, plaintiff could not rely on them to establish proximate cause and the motion judge properly granted defendants summary judgment. See Townsend, 221 N.J. at 60-62.

B. The Motion for Reconsideration.

Plaintiff argues that the motion judge should have granted reconsideration because the judge failed to consider the testimony of Escobar and incorrectly concluded Mizel's opinions regarding safety lapses failed to establish causation in granting summary judgment to defendants.

"We will not disturb the trial court's reconsideration decision 'unless it represents a clear abuse of discretion.'" Kornbleuth v. Westover, 241 N.J. 289, 301 (2020) (quoting Hous. Auth. of Morristown v. Little, 135 N.J. 274, 283

(1994)). "An abuse of discretion 'arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Id. at 302 (quoting Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015)).

Plaintiff argues the motion judge did not consider Escobar's testimony that another scaffold had been in the process of being moved and because the plank on which plaintiff was standing might have been supported by that other scaffold, the removal of the other scaffold could have caused the accident. Plaintiff then argues that Escobar's testimony provides factual support for Mizel's opinion that the plank that tipped was more than eighteen inches past its support and that the scaffold should have been red-tagged and workers should have been prevented from going to the edge of the scaffold.

We reject plaintiff's arguments concerning the testimony of Escobar because even construing the testimony in the light most favorable to plaintiff, it does not support a claim against Bloomfield Associates or ML Masonry. Escobar testified that just before plaintiff had fallen, two other ERJ Construction employees were moving a scaffold around the corner from where plaintiff was working and shouted a warning to plaintiff. That testimony does not support a negligence claim against Bloomfield Associates or ML Masonry. Escobar was

clear that the only people involved in moving the scaffold had been other ERJ Construction employees. Consequently, no one from Bloomfield Associates or ML Masonry was involved in moving the other scaffold and, therefore, they could not have caused the accident.

We also reject plaintiff's argument that Escobar's testimony somehow provides factual support for Mizel's conclusion that the plank plaintiff was standing on extended more than eighteen inches past its support. Escobar gave no such testimony. At best, he said the planks from the two scaffolds had overlapped; he did not testify that they had overlapped by more than eighteen inches. Moreover, to the extent that tape should have been put up to prevent access to the edge of the scaffold, that was the responsibility of ERJ Construction, who set up the scaffolds.

Plaintiff also argues that his and Escobar's testimony that the plank extended either six or twelve inches past the scaffold support must be wrong because according to the analysis of Bloomfield Associates' expert it would be "mathematically impossible" for the plank to have tipped. We reject this argument as mischaracterizing the testimony of Bloomfield Associates' expert. Bloomfield Associates' expert testified that the plank would not have tipped had it extended beyond the support either by six or twelve inches. That testimony

does not mean that the plank, therefore, did extend eighteen or more inches beyond the support. In other words, the analysis of one expert does not establish a basis for a fact that simply is not in evidence.

Finally, plaintiff contends Mizel's opinions regarding the OSHA regulations for safety trainings and inspections clearly explained how Bloomfield Associates' and ML Masonry's violations of those regulations contributed to plaintiff's injury. We reject this argument. As we have already explained, there is no evidence in the record that safety trainings or inspections would have prevented plaintiff's fall. Moreover, plaintiff did not testify that a lack of safety training contributed to his injury.

In short, we reject plaintiff's arguments regarding Escobar's testimony and Mizel's opinions concerning safety trainings and inspections. We discern no abuse of discretion in the trial court's decision denying plaintiff's motion for reconsideration.

Affirmed.