NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

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-2764-19

MERCER INSURANCE CO. OF NEW JERSEY, a/s/o MINNIE MISCIK,

Plaintiff,

v.

KEVIN BARON, JANICE BARON, IAN ROBERT MUSCHETT, SANDRA MUSCHETT, DYLAN WEIDENFELD, EVAN TSCHABOLD, and DEVON PEREZ,

Defendants.

PARAMOUNT INSURANCE COMPANY, a/s/o SANDRA WALTERS, and IAN MUSCHETT,

Plaintiffs-Appellants/
Cross-Respondents,

v.

KEVIN BARON, MAX YENK, and DYLAN WEIDENFELD,

Defendants-Respondents/
Cross-Appellants.

FRANKLIN MUTUAL INSURANCE COMPANY, as subrogee of MINNIE MISCIK,

Plaintiff,

v.

KEVIN BARON,

Defendant/Third-Party Plaintiff,

v.

IAN MUSCHETT, SANDRA WALTERS, DYLAN WEIDENFELD, EVAN TSCHABOLD, and DEVON PEREZ,

Third-Party Defendants.

HIGH POINT PREFERRED INSURANCE COMPANY, a/s/o ROBIN YENK,

Plaintiff,

v.

KEVIN BARON, DYLAN

WEIDENFELD, IAN MUSCHETT,
SANDRA WALTERS,

Defendants,

and

KEVIN BARON,

Third-Party Plaintiff,

v.

DEVON PEREZ and EVAN
TSCHABOLD,

Third-Party Defendants.

Argued November 10, 2021 – Decided January 25, 2022

Before Judges Fuentes, Gilson, and Gooden Brown.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-4236-16.

Richard S. Nichols argued the cause for appellants (Gennet, Kallmann, Antin, Sweetman & Nichols, PC, attorneys; Richard S. Nichols, on the briefs).

Joseph W. Lennon and Michael T. Kearns argued the cause for respondents Kevin Baron and Dylan Weidenfeld (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys for respondent Kevin Baron; Gregory P. Helfrich & Associates, attorneys for respondent Dylan Weidenfeld; Michael T. Kearns and John Aufiero, of counsel and on the brief; Juliann M. Alicino, on the brief).

Barbara S. Sheridan argued the cause for respondent Max Yenk (Law Office of Debra Hart, attorneys; Barbara S. Sheridan, of counsel and on the brief).

PER CURIAM

These appeals arise out of a fire that destroyed a house in New Brunswick. The house was owned by Ian Muschett and Sandra Walters (the Landlords) and insured by plaintiff, Paramount Insurance Company (Paramount). The house consisted of two apartments and, at the time of the fire, one of the apartments had been leased to defendants Kevin Baron and Maxwell Yenk. When the fire started, several people, including defendant Dylan Weidenfeld, were visiting Baron's and Yenk's apartment.[1]

Paramount paid the Landlords for the damage to the house and sued Baron, Yenk, and Weidenfeld, alleging that Baron and Yenk were responsible for the damages under the lease and Baron and Weidenfeld were negligent in causing the destruction of the house. The lease claim against Yenk was dismissed on summary judgment. The negligence claims were tried, and a jury found that Baron and Weidenfeld were not responsible for the destruction of the

[1] In the caption of the complaint, the names Muschett, Dylan, and Tschabold were misspelled as Muschette, Dillon, and Tihabold.

house; rather, the jury found that the Landlords were "100 percent" responsible for the damages.

Paramount appeals from the order dismissing the lease claim on summary judgment. It also appeals from the no-cause judgment entered in favor of Baron and Weidenfeld based on the jury verdict. Baron and Weidenfeld cross-appeal, contending that they should have been granted directed verdicts during trial.

The jury has spoken and found that the Landlords were fully responsible for the destruction of the house. We discern no error in that verdict or the rulings on discovery or the admission of evidence leading up to that verdict. Although we reverse the order granting summary judgment on the lease claim, we remand for the entry of a judgment dismissing the lease claim against Yenk and Baron because the jury verdict now collaterally estops Paramount from claiming that the tenants were responsible for the damage to the house. We dismiss the cross-appeals of Baron and Weidenfeld as moot.

I.

We discern the facts from the record, including the evidence submitted at trial. The Landlords owned a house on Hamilton Street in New Brunswick. The house consisted of two apartments: a lower apartment in the basement and first

floor, and an upper apartment on the second and third floors. The apartments were usually rented to Rutgers students.

In June 2014, Baron and Yenk signed a one-year lease to occupy the lower apartment. On February 1, 2015, Baron hosted a party to watch the Superbowl. Several people attended, including Weidenfeld.

While watching the game, Weidenfeld cut his leg on a coffee table. Baron brought out a bottle of rubbing alcohol to clean the cut. Later, Baron testified that he placed the bottle on the floor but was not sure if he completely screwed the cap onto the bottle. Shortly thereafter, he noticed that the bottle had spilled and a puddle of liquid had formed. He went to clean up the spill, saw that some of the liquid had run under the kitchen oven, and the liquid caught on fire.

Baron was "standing in the puddle" of rubbing alcohol when it ignited. The fire quickly spread to a couch and Baron and others tried to put the fire out. During those efforts, Baron tried to use a fire extinguisher located in his apartment and Yenk retrieved two fire extinguishers from the upper-floor apartment. None of the fire extinguishers worked.

The fire spread quickly and within approximately four minutes, everyone fled the house. Firefighters, police, and medical emergency personnel

responded to the house. While the firefighters arrived shortly after the fire started, the fire ultimately burnt most of the house, causing its total destruction.

One of the responding police officers was Ryan Daughton. After helping to evacuate people in surrounding homes, Officer Daughton spoke with Weidenfeld, Baron, Yenk, and Evan Tschabold, another guest. In his investigative report, Officer Daughton noted: "all parties involved were consuming alcoholic beverages during the evening."

Emergency medical personnel treated Baron at the scene for smoke inhalation and second- and third-degree burns. Thereafter, Baron was taken to a local hospital for further treatment. No one else was seriously injured.

After the fire destroyed the house, Paramount paid the Landlords $363,518 for property damage and lost rent. Thereafter, in 2016, as subrogee to the Landlords, Paramount sued Baron and Yenk. In 2018, Paramount amended the complaint to include Weidenfeld. Paramount asserted two causes of action: breach of contract and negligence. Specifically, Paramount alleged that Baron and Yenk had breached their lease by destroying the house. Paramount also claimed that Baron and Weidenfeld had negligently caused the fire that led to the destruction of the house.

The parties engaged in two years of discovery, which ended in August 2018. The matter was first scheduled for trial in November 2018, but after several adjournments, the trial was rescheduled to begin in January 2020.

In November 2019, Yenk moved for summary judgment to dismiss the breach-of-lease claim against him. At approximately the same time, Paramount asked Baron, through his counsel, to sign a HIPAA authorization to obtain his hospital records. Baron refused and Paramount filed a motion for a protective order to obtain Baron's medical records, contending that the records might show that Baron had been intoxicated when the fire broke out. Baron opposed that motion and cross-moved to join Yenk's motion to dismiss the breach-of-lease claims.

Oral arguments on those three motions were heard on December 20, 2019. On the record, the trial court "reserved" decision, but later that day it issued three orders: (1) granting Yenk's motion and dismissing the contract claim against Yenk; (2) "den[ying]" Baron's motion; and (3) denying Paramount's motion to compel Baron's hospital records.

The order addressing Yenk's and Baron's motion stated:

> IT IS FURTHER ORDERED that as submitted during oral arguments held on December 20, 2019, there exist[] no claims of negligence against Defendant Yenk. According to the Lease and Pursuant to

> paragraph [nine], said Lease ended upon the complete destruction of the property.

The order concerning Yenk's motion then stated: "This motion is hereby GRANTED." The order concerning Baron's cross-motion stated: "Therefore, this motion is hereby denied."

The order denying Paramount's motion stated:

> IT IS FURTHER ORDERED that Plaintiff's motion for [a] Protective Order is an attempt to re-open discovery [] which does not procedurally comply with the Court rules. Further, as this matter is returnable after the conclusion of the discovery end date[,] the Plaintiff has not satisfied exceptional circumstances. Accordingly, [for] these reasons Plaintiff's motion for [a] protective Order [is] hereby denied.

Counsel for all parties agree that the trial court meant to grant Baron's cross-motion to dismiss the breach-of-lease claim. Accordingly, the matter proceeded to trial in January 2020 only on the negligence claims.

On the first day of trial, Baron and Weidenfeld moved in limine to preclude any reference to their use of alcohol on the night of the fire. In response, Paramount argued that Officer Daughton was prepared to testify that Baron and Weidenfeld appeared to be intoxicated when he saw them after the fire.

The trial court granted the motion to preclude and barred any reference to alcohol consumption. The court found that there was no evidence that any alleged drinking of alcohol caused the fire and, therefore, under Rule 403, references to intoxication or drinking would be more prejudicial than probative. In addition, the trial court found that Officer Daughton had not conducted any field sobriety tests nor had he made the type of detailed observations necessary for a factual foundation to opine as to whether Baron or Weidenfeld were intoxicated. The court offered to allow the officer to testify at a Rule 104 hearing outside the presence of the jury to see if he had a factual foundation for his observation in his police report. Counsel for Paramount, however, declined that opportunity.

The case then proceeded to trial before a jury. At trial, the parties disputed what caused the fire to spread so quickly and destroy the entire house. No party called an expert witness to address how the fire started or spread. Instead, the parties relied on the observation of lay witnesses. Paramount called seven witnesses. Based on their testimony, Paramount contended that Baron and Weidenfeld were negligent in causing the fire by knocking over the bottle of rubbing alcohol.

In response, Baron and Weidenfeld testified that they were not sure how the fire started. While Baron acknowledged that the rubbing alcohol spilled and ignited, he testified that he did not know how the bottle was knocked over. Moreover, Baron testified he, Yenk, and others tried immediately to put the fire out. Those efforts included using the fire extinguisher in the apartment and the two extinguishers from the upper-floor apartment. Baron explained that none of the extinguishers worked, and the fire thereafter quickly spread.

At the end of Paramount's case, Baron and Weidenfeld moved for a directed verdict arguing that Paramount needed an expert to explain how the fire started and spread. The trial court denied that motion. Weidenfeld and Baron renewed the motion at the end of their case, but the trial court also denied that motion.

After considering all the evidence, the jury found that neither Baron nor Weidenfeld were negligent. The jury also responded to a series of questions on the Landlords' comparative negligence. The jury unanimously found that the Landlords were negligent, and the Landlords were "100 percent" responsible for "causing the February 1, 2015 fire incident."

On January 30, 2020, the trial court entered two orders memorializing the jury verdict. Those orders dismissed with prejudice all the claims brought

against Baron and Weidenfeld. Paramount now appeals and Baron and Weidenfeld have filed cross-appeals.

II.

On appeal, Paramount makes four arguments. It contends that the trial court erred in (1) dismissing its breach-of-lease claim; (2) denying its motion to compel Baron's hospital records; (3) precluding evidence of Baron or Weidenfeld's alleged intoxication; and (4) allowing the jury to consider the Landlords' comparative negligence without expert testimony addressing how the non-functioning fire extinguishers caused the fire to spread.

Baron and Weidenfeld cross-appeal, arguing that the trial court erred in not granting them directed verdicts. They contend that Paramount could not prove that they were negligent in causing the destruction of the house without an expert testifying on how the fire started and spread.

We hold that the trial court erred in dismissing the breach-of-lease claim on summary judgment. Nevertheless, because the jury has now found that the Landlords were completely responsible for the destruction of the house, Paramount is collaterally estopped from pursuing its breach-of-lease claim. We reject Paramount's other arguments and affirm the January 30, 2020 orders

memorializing the jury verdict. Finally, we dismiss as moot the cross-appeal filed by Baron and Weidenfeld.

A.

We begin by addressing the breach-of-lease claim. Initially, we note that the record is not entirely clear that the breach-of-lease claim against Baron was dismissed. As already pointed out, the order "denied" Baron's cross-motion. Nevertheless, the parties acted as if the breach-of-lease claim had been dismissed and the case proceeded to trial only on the negligence claims. Moreover, the legal issues concerning the breach-of-lease claim are the same issues as they relate to Yenk and Baron.

Interpreting the lease is a question of law that we review on a plenary basis. Kieffer v. Best Buy, 205 N.J. 213, 222 (2011); Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014). Moreover, the issue arose on summary judgment and, therefore, we conduct a de novo review to determine if there were any material issues of disputed fact and, if not, if Baron and Yenk were entitled to a judgment as a matter of law. F.K. v. Integrity House, Inc., 460 N.J. Super. 105, 114 (App. Div. 2019); R. 4:46-2(c).

In interpreting the contract, we start with its plain language. Barila v. Bd. of Ed. of Cliffside Park, 241 N.J. 595, 615-16 (2020). Courts enforce contracts

based on the intent of the parties, the contract's express terms, the surrounding circumstances, and the contract's purpose. Ibid. "[W]hen the intent of the parties is plain and the language is clear and unambiguous, a court must enforce the agreement as written . . . ." Id. at 616 (quoting Quinn v. Quinn, 225 N.J. 34, 45 (2016)). Courts enforce a contract as written and do not "make a better contract for either party." Graziano v. Grant, 326 N.J. Super. 328, 342 (App. Div. 1999).

The lease had two provisions related to responsibility for damages to the apartment. Paragraph eight addressed the tenant's responsibility for repairs and damages. That paragraph stated:

> Care of Apartment. The TENANT has examined the Apartment, including the Living quarters, all facilities, furniture and appliances and is satisfied with its present physical condition. The TENANT agrees to maintain the property in as good condition as it is [in] at the start of this Lease except for ordinary wear and tear. The TENANT must pay for all repairs, replacements and damages caused by the act or neglect of the TENANT, the TENANT's household members or their visitors. The TENANT will remove all of the TENANT's property at the end of this Lease. Any property becomes the property of the Landlord and may be thrown out.

Paragraph nine addressed the Landlord's responsibility for damages and repairs. That paragraph stated:

> Repairs by Landlord. If the Apartment is damaged or in need of repair, the TENANT must promptly notify the Landlord. The Landlord will have a reasonable amount of time to make repairs. If the TENANT must leave the Apartment because of damage not resulting from the TENANT'S act of neglect, the TENANT will not have [to] pay rent until the Apartment is repaired. If the Apartment is totally destroyed, this Lease will end and the TENANT will pay rent up to the date of destruction.

Reading those two provisions together, the lease states that if the tenants or their guests damage the apartment through their own acts or negligence, they will be responsible for the damage. In other words, the plain meaning of the language in the lease makes the tenants responsible for their acts that cause damage.

That plain reading of paragraph eight is confirmed by paragraph nine. Paragraph nine would be superfluous if paragraph eight did not require that the tenants cause the damage. Accordingly, to prevail on their breach-of-lease claim, Paramount had to prove that Yenk, Baron, or one of their guests was responsible for the fire that led to the destruction of the apartment and the house.

The trial court apparently dismissed the breach-of-lease claim based on the last sentence of paragraph nine. That sentence stated: "If the Apartment is totally destroyed, this Lease will end and the TENANT will pay rent up to the

date of destruction." The trial court did not elaborate on how it construed that sentence.

Before us, Baron and Weidenfeld argue that Paramount only took its subrogation claim after the lease had expired and after the landlords had returned the full security deposit to Yenk and Baron. They note that paragraph three of the lease provided: "If the TENANTS comply with the terms of this Lease, the Landlord will return this [security] deposit within thirty (30) days after the Lease, including any extension." Accordingly, Baron and Weidenfeld argue that when the Landlords returned the security deposit, the Landlords acknowledged that Yenk and Baron had not caused the damage to the apartment. They also contend that Paramount had no breach-of-lease claim because when it took its subrogation rights from the Landlord, the lease had already been terminated.

We reject that argument as illogical and because it is inconsistent with the clear language of the lease. The last sentence of paragraph nine does not void the tenant's responsibilities under paragraph eight. Paragraph eight is clear in stating that the tenant "must pay for all repairs, replacements and damages caused by the act or neglect" of the tenants or their visitors. It would be illogical to interpret the sentence in paragraph nine to mean that the tenant is responsible for all damages except if the tenant causes the total destruction of the apartment.

Consequently, we reverse the December 20, 2019 orders dismissing the breach-of-lease claim. Paramount, however, cannot now recover on the breach-of-lease claim. At the trial on the negligence claims, the jury found that the Landlords were one hundred percent responsible for the fire that destroyed the house. That finding collaterally estops Paramount from now contending that Yenk or Baron was responsible under the lease.

Collateral estoppel, also known as issue preclusion, prohibits relitigation of an issue if five elements are met:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.
>
> [Adelman v. BSI Fin. Servs., Inc., 453 N.J. Super. 31, 40 (App. Div. 2018) (quoting Allen v. V & A Bros., Inc., 208 N.J. 114, 137 (2011)).]

Here, the five required elements are met, and Paramount is precluded from relitigating the issue of who was responsible for destroying the property.

One of the issues presented to the jury at the trial was who was responsible for the act that caused the fire to destroy the apartment and the house. After hearing the parties' contentions on that issue, the jury found that Baron and

Weidenfeld were not negligent. Before trial, Paramount had conceded that there was no evidence showing that Yenk had engaged in any action causing the fire. Critically, the jury also found that the Landlords were completely responsible for the fire. Given that finding, there is no "act or neglect" that Paramount can now prove to demonstrate that Yenk or Baron breached the lease.

In other words, Paramount cannot argue that Yenk and Baron were effectively strictly liable because the fire started in the apartment. Instead, under the plain language of the lease, Paramount must prove that an act or neglect by Yenk or Baron caused the house to be destroyed by the fire. A jury, however, has already determined that the negligence of the Landlords caused the destruction of the house. That finding was supported by substantial credible evidence demonstrating that the fire extinguishers supplied by the Landlords did not work. The jury, therefore, could reasonably conclude that had those extinguishers operated properly, the fire would have been put out in its early stages and the ensuing fire that destroyed the house would not have occurred.[2]

[2] Defendants argued that Paramount did not preserve its right to appeal the December 20, 2021 orders because it did not list those orders in its notice of appeal. See R. 2:5-1(e)(2). While that argument has some merit, we have considered the substantive argument because all parties had a full opportunity to address the lease issues.

B.

In its second argument, Paramount contends that the trial court erred in not compelling Baron to sign the HIPAA authorization and not allowing them to obtain Baron's hospital records. Paramount contends that those hospital records may have shown that Baron had a blood alcohol level indicating that he was intoxicated.

Appellate courts generally defer to discovery rulings made by trial courts "absent an abuse of discretion or a . . . misunderstanding or misapplication of the law." Capital Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017) (citing Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)). Here, we discern no abuse of discretion.

Paramount never sought the disclosure of Baron's hospital records while the matter was open for discovery for over two years. It was a year after discovery had closed and the first trial date had been scheduled that Paramount first requested the HIPAA authorization. The trial judge denied Paramount's ensuing motion to compel, reasoning that Paramount had made no showing of the "exceptional circumstances" required to reopen discovery. R. 4:24-1(c).

Paramount argues that the trial court erred because it was not seeking to open discovery; rather, it was serving a trial subpoena. That argument is not

supported by the record. Paramount was not merely issuing a trial subpoena. Instead, it was seeking to introduce a new concept into the disputed issues. The question of whether Baron was intoxicated would have engendered a need for further discovery and possible expert testimony. Consequently, we discern no abuse of discretion in the trial court's decision to deny the motion to compel.

C.

Paramount next argues that the trial court erred in precluding it from introducing evidence of defendant's intoxication. Initially, we clarify that Paramount did not submit any evidence that any defendants had been intoxicated. Instead, it contends that Officer Daughton would have testified that Baron and Weidenfeld were intoxicated. The trial judge correctly recognized that the record contained no evidence to support such testimony. The only thing in the record was a reference in Officer Daughton's report that some of the people at the gathering had been drinking alcohol. There was no reference to the amount of alcohol consumed or whether any of the tenants or their guests were intoxicated.

When the trial judge offered Paramount the opportunity to have a Rule 104 hearing to explore what observations, if any, the officer made concerning intoxication, Paramount's attorney declined that opportunity. We, therefore,

find no error in the trial court's decision to preclude any reference to drinking alcohol because such testimony would have been more prejudicial than probative under N.J.R.E. 403. See Rodriguez v. Wal-Mart Stores, Inc., 237 N.J. 36, 57 (2019) (a trial court has "broad discretion" to determine whether evidence's "probative value is substantially outweighed by its prejudicial nature"); State v. Nelson, 173 N.J. 417, 470 (2002) (observing that trial courts have considerable discretion when making assessments under N.J.R.E. 403).

D.

Finally, Paramount contends that the trial court erred in allowing the jury to consider the Landlords' comparative negligence without expert testimony. In that regard, Paramount contends that the question of how a fire extinguisher functions and whether the extinguishers could have put out the fire were issues beyond the understanding of a jury and required expert testimony. We reject this argument.

Trial courts determine whether expert testimony will be admitted by applying N.J.R.E. 702, which states that an expert may testify "[i]f scientific . . . knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." State v. Pickett, 466 N.J. Super. 270, 301 (App. Div. 2021) (alteration in original). To satisfy this requirement, the proponent of

expert evidence must establish, among other things, that "the subject matter of the testimony [is] 'beyond the ken of the average juror.'" Ibid. (quoting State v. J.L.G., 234 N.J. 265, 280 (2018)). "[E]xpert testimony is not necessary when the subject can be understood by jurors utilizing common judgment and experience." Campbell v. Hastings, 348 N.J. Super. 264, 270 (App. Div. 2002).

"Certain dangerous conditions that create the foreseeable risk of fire are well known to ordinary people and are a matter of common knowledge." Scully v. Fitzgerald, 179 N.J. 114, 127 (2004). A decision on the necessity of expert testimony is reviewed for abuse of discretion. Maison v. N.J. Transit Corp., 460 N.J. Super. 222, 232 (App. Div. 2019).

The question of whether the Landlords were comparatively negligent in causing the destruction of the home by fire was not beyond the ken of the average juror. Baron testified that he and others made efforts to put the fire out as soon as it ignited. Among those efforts, he testified that he grabbed the fire extinguisher that the Landlords had supplied for his apartment and tried to use it, but it did not work. He also testified that Yenk ran up and got fire extinguishers from the upper apartment, but when they tried to use those extinguishers, they also did not work. Based on that evidence, a jury could reasonably conclude that had the fire extinguishers worked, they could have put

out the fire in its initial stages and stopped it from spreading. The jury did not need an expert to explain that concept to them. Accordingly, we affirm the orders memorializing the jury verdict.

E.

Having affirmed the no-cause verdicts entered in favor of Baron and Weidenfeld, there is no need to address their cross-appeal because it is moot. An issue is considered moot when this court's decision "can have no practical effect on the existing controversy." Wisniewski v. Murphy, 454 N.J. Super. 508, 518 (App. Div. 2018) (quoting Redd v. Bowman, 223 N.J. 87, 104 (2015)). Accordingly, the cross-appeal is dismissed as moot.

F.

In summary, we affirm the orders dated January 30, 2020, memorializing the jury verdicts. We reverse the December 20, 2019 orders dismissing the breach-of-lease claim. We remand with direction that the trial judge enter a judgment dismissing the breach-of-lease claim against Yenk and Baron based on the doctrine of collateral estoppel because a jury has already determined that the Landlords were responsible for the fire that destroyed the house.

Affirmed and remanded. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION