NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

FAIRFIELD MOTORS, INC. and ADJESS ASSOCIATES, LLC,

Plaintiffs,

v.

KEVIN DIPIANO, PERFORMANCE AUTOS OF NJ, LLC, and POMPTON REALTY, LLC,

Defendants.

KEVIN DIPIANO, PERFORMANCE AUTOS OF NJ, LLC, and POMPTON REALTY, LLC,

Third-Party Plaintiffs,

v.

ADAM BARISH, individually, JESSICA BARISH, individually, and DIANE OLIVEIRA, individually, ALAN GINSBERG, Individually, BRUNO DIBELLO & CO., LLC, STU LASSER, individually, and LASSER ADVISORY SERVICS LLC,

Third-Party Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : MORRIS COUNTY

DOCKET NO. MRS-L-1909-17

CIVIL ACTION - CBLP

OPINION

Argued: October 25, 2024

Decided: October 25, 2024

Jeffrey S. Mandel, Esq. of Law Offices of Jeffrey S. Mandel LLC, attorneys for the Plaintiffs Fairfield Motors, Inc. and Adjess Associates, LLC and Third-Party Defendants Adam Barish, Jessica Barish, and Diane Oliveira.

James K. Webber, Esq. and Craig W. Davis, Esq. of Webber McGill LLC, attorneys for Defendants/Third-Party Plaintiffs Kevin DiPiano, Performance Autos of NJ LLC, and Pompton Realty, LLC.

Charles W. Mondora, Esq. of Landman Corsi Ballaine & Ford P.C., attorneys for Third-Party Defendant, Bruno, DiBello & Co., LLC.

Gregory S. Hyman, Esq. and Eileen Monaghan Ficaro, Esq. of Kaufman Dolowich, LLP, attorneys for the Third-Party Defendant, Alan Ginsburg.

Frank J. DeAngelis, P.J. Ch.,

I. BACKGROUND INFORMATION

The instant matter comes before the Court by way of Third-Party Defendant Bruno, DiBello & Co.'s motion for summary judgment, Plaintiffs Fairfield Motors, Inc. ("Fairfield") and Adjess Associates, LLC ("Adjess"), and Third-Party Defendants Adam Barish, Jessica Barish, and Diane Oliviera's motion for partial summary judgment, and Third-Party Defendant Alan Ginsberg's motion for summary judgment. The underlying action arose out of an agreement to purchase a motor vehicle dealership and its related assets and land. Fairfield and its owners and operators, Diane Oliveria, Adam Barish, and Jessica Barish, (collectively "Sellers") entered into an agreement with Kevin DiPiano ("DiPiano") and Performance Autos of NJ, LLC ("Performance") (collectively "Buyers") for the purchase of the franchised Honda motor vehicle dealership, its land and related assets. The underlying lawsuit between buyer and seller arises from that sale.

On February 18, 2020, Buyers filed a Third-Party Complaint against Third-Party Defendant Bruno, DiBello & Co., LLC ("BDC") and one of its former accountants, Alan Ginsberg ("Ginsberg"). BDC is an accounting firm that performed accounting services for Buyers. On January 20, 2016, BDC authored an Agreed-upon Procedures Report ("AUP Report") with respect to the car dealership. Buyers asserted multiple claims against BDC and Ginsberg. On July 16,

2021, the Hon. Peter A. Bogaard dismissed most of the claims, leaving only the professional malpractice claim.

II. STANDARD OF REVIEW

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The trial court's "function is not . . . to weigh the evidence and determine the truth . . . but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The trial judge must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Ibid. When the facts present "a single, unavoidable resolution" and the evidence "is so one-sided that one party must prevail as a matter of law," then a trial court should grant summary judgment. Ibid.

III. ANALYSIS

a. BDC and Ginsberg's Motions for Summary Judgment

BDC argues that Buyers cannot establish the elements of an accounting professional malpractice claim. BDC submits that a "claim for damages related to professional malpractice accrues when the professional's negligence is the proximate cause of the client's damages. . . . [and], an accountant may be held responsible to those to whom a duty is owed, for failure to adhere to the [accepted] standards of [conduct for] the profession." Kabakibi v. Sarva, No. A-2795-17T2 (App. Div. Oct. 24, 2019). BDC provides that the standard of care "must normally be established

by expert testimony," and "there must be some evidence support offered by the expert establishing the existence of the standard." Id. BDC does not dispute the existence of an accountant-client relationship between BDC and DiPiano but asserts that Buyers have failed to offer expert testimony establishing the applicable standard of care required under the parties' engagement.

BDC alleges that Buyers' expert, Gary Trugman ("Trugman") failed to establish the standard of care or breach of same in his report. BDC maintains that the establishment of a standard of care is necessary to prevent a jury from speculating, without expert testimony, in an area where laypersons have insufficient knowledge or experience. See Taylor v. DeLosso, 319 N.J. Super. 174, 180 (App. Div. 1999). BDC provides that that it is "insufficient for plaintiff's expert simply to follow slavishly an 'accepted practice' formula; there must be some evidential support offered by the expert establishing the existence of the standard." Id. BDC asserts that courts have dismissed professional negligence actions against members of other professions for failure to establish a standard of care. See Smith v. Elite Spine & Sports Care of Totowa, LLC, No. A-2233-21, 2023 WL 4284963, *8 (App. Div. June 30, 2023); see also DeCaro v. Elkind & DiMento, No. A-2707-22, 2024 WL 2196587, *1, *2 (App. Div. May 16, 2024).

BDC submits that in the instant matter, Trugman's report is devoid of any discussion as to the applicable standard of care. BDC alleges that Trugman conceded at his deposition that his report does not contain any specific information regarding the standard of care in this matter. BDC asserts that Trugman testified that he was hired to do an economic damages opinion, rather than a standard of care opinion. BDC additionally argues that Buyers have failed to set forth any expert testimony establishing that BDC breached any such standard of care. BDC provides that at his deposition, Trugman testified that there would have been a breach in the standard of care had any

services requested by DiPiano not have been provided. BDC claims that this opinion was not in Trugman's report.

BDC alleges that Trugman's report is comprised of inadmissible net opinion. BDC submits that "New Jersey Rules of Evidence 702 and 703 control the admission of expert testimony." In re Accutane Litig., 234 N.J. 340, 348 (2018). BDC asserts that N.J.R.E. 702 "imposes three basic requirements: "(1) the intended testimony must concern a subject matter that is beyond the ken of the average juror; (2) the field testified to must be at a state of the art such that an expert's testimony could be sufficiently reliable; and (3) the witness must have sufficient expertise to offer the intended testimony." Creanga v. Jardal, 185 N.J. 345, 354-55 (2005). BDC maintains that N.J.R.E. 703 mandates that an expert's opinion 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."

BDC submits that the net opinion rule is a corollary of N.J.R.E. 703, which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data. BDC argues that an expert must "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[, and] [a]n expert's conclusion [should be] excluded if it is based merely on unfounded speculation and unquantified possibilities." Townsend v. Pierre, 221 N.J. 36, 55 (2015). BDC contends that Buyers failed to set forth the applicable standard of care with expert testimony, and therefore, Trugman's report also constitutes an inadmissible net opinion. BDC argues that any opinions within the report are conclusory and not grounded in evidentiary support.

BDC further argues that because there was no standard of care, or deviation of same, Buyers cannot establish that BDC was the proximate cause of any alleged harm. BDC submits that in professional negligence cases, a "plaintiff must establish that the defendant deviated from an accepted standard of care and the deviation was the proximate cause of the harm suffered by the plaintiff." Shamy v. Gamao, No. A-3331-20, 2023 WL 6939135, *1, *6 (App. Div. Oct. 20, 2023). BDC provides that 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." Gilbert v. Stewart, 247 N.J. 421, 443 (2021). BDC asserts that "summary judgment is appropriate in a professional negligence case if the plaintiff has not identified a competent causation expert in discovery." Vasaturo v. Elmwood Hills Healthcare Ctr., No. A-2926-20, 2022 WL 16709534, *1, *3 (App. Div. Nov. 4, 2022).

BDC argues that in the instant matter, DiPiano admitted that he did not rely on what his accountants told him, and Buyers cannot establish the reliance or causation element needed to prove their professional malpractice claim. BDC submits that DiPiano testified that Ginsberg, after reviewing the financial documents provided, could not provide him with a complete opinion as to the financial state of the dealership because it was inconclusive. BDC alleges that DiPiano nevertheless proceeded to purchase the dealership despite the inconclusive financials because he took what he saw at face value and believed that it was okay. Furthermore, BDC asserts that an automotive buyer's outside accountants—like BDC—that perform only "alleged due diligence work" prior to the close of a sale, cannot proximately cause the dealership to lose profits after the sale is finalized and the buyer takes possession, because the accountants have no control over the post-sale dealership's financial performance or vehicle inventory. BDC claims that Trugman

agreed with this contention at his deposition. BDC therefore argues that it cannot be the proximate cause of any alleged lost profits.

In addition to BDC, Ginsberg moves for summary judgment seeking to dismiss the professional malpractice claim. Ginsberg argues that Buyers' professional malpractice claim cannot succeed because Buyers cannot establish that they relied on any advice supplied by Ginsberg in purchasing the dealership. Ginsberg asserts that "[a] negligence cause of action requires the establishment of four elements: (1) a duty of care, (2) a breach of that duty, (3) actual and proximate causation, and (4) damages." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014). Ginsberg submits that a "claim for damages related to professional malpractice accrues when the professional's negligence is the proximate cause of the client's damages." Kabakibi, No. A-2795-17T2, 2019 WL 5448676, at *3. Ginsberg provides that "[p]roximate cause requires an initial determination of cause-in-fact' ... [which] 'requires proof that the result complained of probably would not have occurred but for the negligent conduct of the defendant." Morris Properties, Inc. v. Wheeler, 476 N.J. Super. 448, 459 (App. Div. 2023).

Ginsberg alleges that Buyers cannot prove that any alleged action or inaction on the part of Ginsberg proximately caused Buyers any alleged damages. Ginsberg asserts that DiPiano admitted that he continued with purchase of the Dealership despite the fact that Ginsberg could not "draw a complete opinion" regarding financial records pertaining to the Dealership. See Ex. 11, DiPiano April 23, 2018 Dep. at 47:22 – 48:3. Ginsberg further claims that DiPiano does not recall if he ever received or reviewed the AUP Report before closing on the purchase of the Dealership. See Ex. 15, DiPiano April 13, 2023 Dep. at 16:8 – 17:12, 26:21-25. Ginsberg argues that because DiPiano does not remember receiving the report, nothing contained in the AUP Report could have influenced DiPiano's decision to purchase the Dealership.

Ginsberg contends that Buyers lack the necessary expert testimony to establish the applicable standard of care or breach of said standard by Ginsberg. Ginsberg submits that while in most negligence cases, the plaintiff is not required to establish the applicable standard of care, "[i]n nearly all malpractice cases a plaintiff needs to produce an expert establishing what standard of care is applicable and how the alleged actions deviated from the appropriate standard." Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C., 179 N.J. 343, 361-62 (2004). Ginsberg provides that following Kabakibi, expert testimony establishing a standard of care is necessary for accounting malpractice claims. Kabakibi, No. A-2795-17T2, 2019 WL 5448676, at *3.

Ginsberg argues that while Buyers did bring in Trugman as an expert witness at the outset of the case, Trugman did not define the applicable standard of care in the expert report he later authored in this matter or opine that Ginsberg violated any applicable standard of care. See Ex. 14, Trugman Rpt. Ginsberg contends that even if the Court finds that Trugman's opinions do pertain to liability, they are "net opinions," insufficient to defeat summary judgment. Ginsberg maintains that the net opinion rule is a corollary to N.J.R.E. 703 and provides that "[a]n expert's bare opinion that has no support in factual evidence or similar data is a mere net opinion which is not admissible and may not be considered." Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011). Furthermore, Ginsberg submits that "[a] trial court may not rely on expert testimony that lacks an appropriate factual foundation and fails to establish the existence of any standard about which the expert testified." Pomerantz, 207 N.J. at 373.

Ginsberg alleges that Trugman did not set forth the applicable standard of care or opine that Ginsberg breached it in his report. Ginsberg contends that while Trugman did testify that "no services that would be typical in rendering due diligence for the purchase of an automobile dealership were performed by BDC, although Mr. DiPiano indicated that it was his expectation

that those services would be performed," Trugman provided no standard of care applicable to due diligence, in general or specific to purchase of an automobile dealership or specify the "services" he opined would be "typical." See Ex. 14, Trugman Rpt, at pp. 3-4.

Ginsberg additionally argues that Buyers lack the necessary expert testimony to establish the causation element of their claim against Ginsberg. Ginsberg claims that "proximate causation must ordinarily be established by expert testimony." Wiebel v. Morris, Downing & Sherred, LLP, No. A-4067-16T2, 2018 WL 6369453, at *5 (N.J. Super. Ct. App. Div. Dec. 6, 2018). Ginsberg alleges that in the instant matter, Trugman makes conclusory statements in his expert report such as that his services "include a calculation of the economic damages suffered by the Third-Party Plaintiffs as a result of the alleged Professional Malpractice Claim against Alan Ginsberg, CPA and Bruno DiBello & Co. LLC…." (See Ex. 14 at p. 1). Ginsberg maintains that despite these allegations, Trugman does not specifically opine that Ginsberg's conduct caused Buyers any damages or explain how it could have done so. Ginsberg therefore submits the Buyers' claim of professional malpractice is subverted by their absence of requisite expert testimony.

In opposition to both motions for summary judgment, Buyers argue that performance is not required to establish the standard of care by expert testimony. Buyers assert that the Kabakibi decision, which BDC and Ginsberg both quote in their moving briefs, states that "[i]n a professional negligence case, the standard of care must normally be established by expert testimony." Kabakibi, 2019 WL 5448676, at *3. Buyers submit that while under the general rule, a "[p]laintiff must produce expert testimony upon which the jury could find that the consensus of the particular profession involved recognized the existence of the standard defined by the expert," some professional malpractice cases do not require expert testimony. Taylor, 319 N.J. Super. at 180; see Kelly v. Berlin, 300 N.J. Super. 256, 265 (App. Div. 1997).

Buyers maintain that expert testimony is "not needed to establish the appropriate professional standards of care where either the doctrine of res ipsa loquitur or the doctrine of common knowledge applies." Id. Buyers provide that the common knowledge applies were defendant's negligence "is readily apparent to anyone of average intelligence and ordinary experience." Est. of Chin v. St. Barnabas Med. Ctr., 160 N.J. 454, 469-70 (1999). Buyers contend that such is the case in the instant matter. Buyers cite to fact patterns where a dentist pulled the wrong tooth, a doctor injected a caustic substance into a patient's nose, and a dentist provided a patient with a combination of anesthetics commonly known to be harmful to individuals with hypertension. See Steinke v. Bell, 32 N.J. Super. 67, 70 (App. Div. 1954); Becker v. Eisenstodt, 60 N.J. Super. 240, 246 (App. Div. 1960); Sanzari v. Rosenfeld, 34 N.J. 128, 141-42 (1961). Buyers cite to additional caselaw in the legal malpractice arena. See Brizak v. Needle, 239 N.J. Super. 415, 432 (App. Div. 1990) (holding expert opinion unnecessary to establish the negligence of a personal injury attorney who failed to conduct any investigation of his client's case); Sommers v. McKinney, 287 N.J. Super. 1, 11-12 (App. Div.1996) (reversing a grant of summary judgment in favor of a legal malpractice defendant because testimony was not necessary to prove the attorney should have prepared the case for trial, accurately reported to the client about settlement discussions, and made appropriate settlement and litigation recommendations). Buyers allege that the common knowledge exception applies to the case at hand because it is an allegedly simple determination as to whether Ginsberg and BDC performed the due diligence requested by their client.

Buyers further argue that Trugman did opine on the standard of care. Buyers allege that Mr. Trugman opined in his report that "a certain level of due diligence" should have been performed by BDC in connection with the transaction, which would have included updating the

AUP Report to bring it current as of the consummation of the sale. Buyers submit that Trugman opined that Ginsberg and BDC failed to consider, as part of due diligence, the declining trend in used vehicle sales, the decline in gross profit margin for the service department, and the overall decline in normalized profits up to the day DiPiano assumed control of the Dealership. Buyers provide that Trugman concluded in his report that as a result of these alleged failures DiPiano "purchased the dealership without relevant up to date information." Buyers bolster Trugman's alleged standard of care with DiPiano's own testimony where he explains what he understood due diligence to mean.

Buyers allege that Trugman's report is not a net opinion. Buyers argue that because the common knowledge exception applies, the requirements of N.J.R.E. 702 are inapplicable. Buyers maintain that "the intended testimony" does not "concern a subject matter that is beyond the ken of the average juror." Buyers contend that as expert testimony is not required to establish a standard of care, whether Trugman's report is a net opinion on that issue is irrelevant. Buyers nonetheless assert that Trugman based his opinions regarding the standard of care on DiPiano's expressed expectations that due diligence be performed, the absence of a signed agreement establishing the scope of work (in violation of professional accounting standards), and BDC and Ginsberg's alleged failure to perform due diligence. Buyers claim that Trugman's opinions are supported by factual record evidence and do not run afoul of N.J.R.E. 703's bar on net opinions.

Buyers allege that DiPiano can establish reliance and causation, but that they are issues of fact. Buyers contend that Trugman opined that BDC and Ginsberg's alleged deviation from the standard of care for the performance of due diligence caused Performance's damages in the form of lost profits. Buyers submit that causation in professional malpractice cases may be subject to the common-knowledge exception. Kranz v. Tiger, 390 N.J. Super. 135 (App. Div. 2007). Buyers

contend that in this case, causation is straightforward. Buyers claim that DiPiano was not advised about the declining profits at the dealership because BDC and Ginsberg did not inform him. Buyers argue that the causal link is clear, and that to the extent it requires expert testimony, Trugman has provided such.

In reply, BDC maintains its argument that expert testimony is required to establish the standard of care. BDC contests DiPiano's assertion that the common knowledge exception applies. BDC submits that New Jersey courts narrowly construe the common knowledge exception. See Kelly v. Berlin, 300 N.J. Super. 256, 266 (App. Div. 1997). BDC argues that this is not a malpractice case with facts that support liability within the ken of the average juror as it requires an evaluation of accounting services that were performed with respect to an automotive dealership sale.

BDC asserts that expert testimony is impermissible net opinion if it constitutes a bare conclusion only, and if the expert is not in possession of specific facts to distinguish his opinion from mere speculation or conjecture. Pomerantz Paper., 207 N.J. 372. BDC provides that "[a] standard which is personal to the expert is equivalent to a net opinion." Taylor, 319 N.J. Super. at 180. BDC claims that the expert in this case is required to provide support for his opinion that the duty of care is accepted by the industry and the consensus of the particular profession. BDC alleges that this support is absent from Buyers' submissions and that instead, DiPiano has provided his own personal opinions as to due diligence. BDC contends that any opinions provided by Trugman lack evidentiary support and stem only from the complaint and two phone conversations with DiPiano. BDC alleges that Trugman admitted in deposition that he did not discuss the standard of care in his report. BDC further reasserts its contention that Trugman's report fails to causally link damages to BDC's conduct. BDC maintains that an automotive buyer's outside accountants that

perform only "alleged due diligence work" prior to the close of a sale, cannot then proximately cause the dealership to lose profits after the sale is finalized and the buyer takes possession.

In reply, Ginsberg asserts that Buyers cannot establish that they relied on any advice supplied by Ginsberg or BDC. Ginsberg reiterates his allegation that DiPiano admitted at deposition that he continued with the purchase of the dealership despite Ginsberg's disclosure that he could not draw a complete opinion regarding the dealership's finances. Ginsberg argues that Buyers' reliance on Trugman to establish causation is insufficient because Trugman's opinions are net opinions. Ginsberg contends that any insinuation by Trugman that the AUP Report prepared by Ginsberg and BDC was inadequate and caused Buyers to suffer damages should be rejected as DiPiano did not recall if ever received or reviewed the AUP Report before closing. Ginsberg submits that DiPiano therefore could not have relied on the AUP Report in deciding to purchase the dealership. Ginsberg joins in and incorporates by reference BDC's arguments as to the insufficiency Trugman's expert opinions and testimony.

To bring a successful negligence action, a plaintiff must establish (1) a duty of care, (2) a breach of that duty, (3) actual and proximate causation, and (4) damages. See Davis, 219 N.J. at 406. Generally, in a professional negligence case, the plaintiff must establish a duty of care through expert testimony. See Taylor, 319 N.J.Super. at 180. It is clear that expert testimony is necessary to establish the standard of care and breach of the standard for an accountant. The third-party claim asserts a cause of action against Ginsberg and BDC under the theory of professional malpractice, and an affidavit of merit was served by Buyers. The Court finds that Buyers have not established a standard of care through expert testimony for the due diligence requested of BDC and Ginsberg. Trugman's deposition and report may opine that BDC and Ginsberg failed to perform due diligence, but Trugman did not establish a standard for due diligence. Trugman does not discuss

what due diligence would look like, what services would be common under due diligence, or the services that, in his opinion, Ginsberg and BDC failed to provide.

Buyers claim that the common knowledge exception applies to this matter, rendering expert testimony unnecessary. The Court disagrees. Using Buyers' submissions, the common knowledge exception applies where defendant's negligence "is readily apparent to anyone of average intelligence and ordinary experience." Est. of Chin, 160 N.J. at 469-70. However, the common knowledge exception is narrowly construed, and New Jersey courts will hesitate to apply it except where clearly applicable. See Kelly, 300 N.J. Super. at 266.

The Supreme Court has explained that "when deciding whether expert testimony is necessary, a court properly considers 'whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the [defendant] was reasonable.'" Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 407 (2014) (quoting Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982)); see also Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387, 394 (2001) (holding expert testimony is not needed under the affidavit 13 A-0484-23 of merit statute when the jury's "common knowledge as lay persons is sufficient to enable them, using ordinary understanding and experience, to determine a defendant's negligence") (quoting Est. of Chin, 160 N.J. at 469). In cases where "the factfinder would not be expected to have sufficient knowledge or experience," expert testimony is needed because the jury "would have to speculate" regarding the standard of care. Torres v. Schripps, Inc., 342 N.J. Super. 419, 430 (App. Div. 2001).

There may be "exceptionally rare cases in which the common knowledge exception applies [if] an expert is not needed to demonstrate a defendant professional breached some duty of care 'where the carelessness of the defendant is readily apparent to anyone of average intelligence.'"

Cowley v. Virtua Health Sys., 242 N.J. 1, 17 (2020) (quoting Rosenberg v. Cahill, 99 N.J. 318, 325 (1985)); see also Hubbard, 168 N.J. at 394 ("[I]n common knowledge cases[,] an expert is not needed to demonstrate that a defendant breached a duty of care.").

The Court finds that Buyers' claim that a juror of average intelligence would be able to decipher what the due diligence standard is for accountants in preparing for the sale of a dealership lacks merit. While the ultimate determination of whether BDC or Ginsberg acted with due diligence may or may not be as simple as Buyers contend, jurors have no guidance as to an accountant's due diligence and what should have been expected of BDC and Ginsberg. The Court is unpersuaded by Buyers' caselaw. Those cases differ in both subject matter and factual background. It is clear that removing the incorrect tooth is negligence, but it is not as easily evident whether BDC and Ginsberg acted with due diligence in their consulting as to the purchase of the dealership. See Steinke, 32 N.J. Super. at 70. The Court finds that Buyers have not established a standard of care as required for a negligence claim.

b. Sellers' Motion for Summary Judgment

In support of their own motion for summary judgment, Sellers submit that summary judgment is appropriate when "there is no genuine issue as to any material fact challenged and… the moving party is entitled to a judgment or order as a matter of law." R. 4:46- 2(c). Sellers provide "[w]hen the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Brill, 142 N.J. at 540. Sellers argue that while the Hon. Peter A. Bogaard denied Sellers's summary judgment previously, he did so relying on an incorrect standard. Sellers maintain that DiPiano bears the burden of proof, and, for his claims based on fraud, he requires clear and convincing evidence. Stoecker v. Echevarria, 408 N.J. Super. 597, 617 (App. Div. 2009).

Sellers allege that there is no evidence of fraud and that neither DiPiano nor his expert, Trugman, could identify said fraud or any damages arising from it. Sellers claim that to date, they have not received any documentation identifying DiPiano's damages from the alleged fraud. Sellers contend that DiPiano lacked requisite expert testimony as to describe the computer system, his overpayment for the dealership, the existence of diminished sales, and the dealership's alleged deficiency in operations. Sellers argue that any determination by a jury of damages arising from these claims would constitute conjecture due to the lack of expert testimony. Sellers also request that the Court strike the 90-day stay of the entry of final judgment because there is allegedly no basis for it.

In opposition to Sellers' motion for summary judgment, Buyers argue that the motion is improper and should not be considered. Buyers submit that prior to the instant motion, Sellers and Fairfield filed three separate motions for summary judgment and a motion for reconsideration addressing Buyers' counterclaims. Buyers maintain that the relief sought in those motions is the same relief as Sellers currently seek. Buyers deny Sellers' allegation that their counterclaims originated with Buyers' lawyers and claim, instead, that they are based on documentary and testimonial evidence.

Buyers contend that whether they can prove fraud or their other causes of action cannot be decided on summary judgment. Buyers allege that that they have provided ample evidence of Sellers' alleged misrepresentations to survive summary judgment. Buyers claim that they relied on Sellers' promise to maintain the dealership leading up to the sale and argue that Sellers failed to maintain a normal used vehicle inventory or keep their service department in good condition. Buyers further deny that Sellers' contention that Buyers' claims should fail due to a lack of expert testimony because an expert is not always required to prove damages. Buyers provide that the rules

of evidence allow for lay opinion testimony. N.J.R.E 701. Buyers assert that they can produce evidence through documents and testimony of it its employees and officers that there is a genuine issue of fact. Last in their opposition, Buyers argue that the 90-day ruling should not disturbed as Sellers allegedly failed to present a legal basis to disturb the order.

In reply, Sellers allege that Buyers' opposition confirms the inadmissibility of Trugman's report against Sellers. Sellers submit that Trugman's report does not appear in any of the prior motions for summary judgment. Sellers additionally argue that the discovery and motions that were "fully disposed of," per Performance. Sellers maintain that discovery was "fully and finally" concluded prior to Performance serving Mr. Trugman's report. Therefore, Sellers contend that Trugman's report should not be considered against Fairfield. Sellers posit that without Trugman's report to use against Fairfield, and because the Vallen report offers no opinion of damages against Fairfield, Performance has no expert to testify against Fairfield Motors.

Furthermore, Sellers argue that Buyers lack an identifiable breach of contract and resulting damages. Sellers take issue with Buyers' assertion that that there was a "drop in customers and repair orders and inflated profits reported by Fairfield. Davis Brief, pg. 10. Sellers maintain that Buyers provide no calculation for the "drop" or a link to Fairfield. Sellers submit that a jury cannot be asked to render damages when neither Performance nor its experts are able to do so. Sellers make the same argument as to Buyers' alleged inflated sealer hold-backs and cancellation of key vendor contracts. Sellers assert that the foundation for the alleged breaches is that Fairfield failed to "operate the Dealership 'in the ordinary course,'" but Buyers need expert testimony about the "ordinary course" of operating a car dealership. Sellers point to Buyers' lack of expert testimony to establish any of their claims and allegations in their action against Sellers.

Sellers contest Buyers' reliance on Carla Clayton ("Clayton") to serve as their expert. Sellers argue that Clayton cannot now be presented, as counsel describes her, as "a person with knowledge of Fairfield's failure to maintain customary operations of the Dealership and resulting damages to Performance." Response to SOF, ¶53, 54. Sellers provide that customary operations of a car dealership is a topic beyond the ken of an average juror. Sellers assert that Clayton is not identified in discovery as an expert, and did not prepare an expert report—rather her first "testimony" appears in a certification filed with Buyers' opposition to this motion for summary judgment. Sellers maintain that Clayton's opinion is not properly before this Court and is not properly part of this case. See generally, Gross v. TJH Automotive Co., L.L.C., 380 N.J. Super. 176, 183 (App. Div. 2005) (noting the use of a certified public accountant and an expert in "automotive dealership financial information and . . . operating procedures for automotive dealers"). Sellers argue the same for Dipiano, who submitted a report in opposition to this motion but was not identified as an expert. Sellers allege that even if DiPiano was permitted to testify as an expert witness, his assertion that "the value of the dealership I received was approximately 70% of the value" of the $20,000,000.00 purchase constitutes a net opinion for failure to provide a basis for the claim.

Sellers assert that Buyers' use of the Rules of Evidence is incorrect as the expert testimony issue still stands. Sellers allege that DiPiano lacks first-hand knowledge about the elements of damages being presented by his lawyers. Second, Sellers argue that perception evidence under N.J.R.E. 701 allows, under limited circumstances, someone to convey what he or she observed, as it occurred, but the witness cannot, as here, go back and review evidence and testify about his or her conclusions. Third, Sellers contend that allowing either DiPiano or Clayton to serve as Buyers' de facto expert would be inconsistent with their representations in answers to interrogatories that

experts were needed and would be retained to perform a "forensic review" of the records to then opine on damages. Fourth, Sellers maintain that expert Vallen (Buyers' own expert) made clear she could not opine on damages unless Performance came forward with additional evidence.

Next, Sellers argue that Fairfield is entitled to summary judgment due to an intervening or superseding malpractice and based on DiPiano's decision to proceed with knowledge that he lacked documentation. Sellers do not agree that Trugman's opinion is admissible. However, Sellers allege that regardless of its admissibility, (1) the claim against the professionals defeats the claim against Fairfield; and (2) Buyers' decision to proceed with knowledge it lacked documents it now claims it lacked, also defeats its claim. Sellers submit that Buyers admit that DiPiano relied on his professionals, and, per Trugman, those professionals are the "but for" - sole - cause identified for Performance's damages. Sellers claim that DiPiano's testimony that he agreed to a purchase price before communicating with Fairfield or reviewing financial records and cannot recall reviewing financial records he relied on to agree on a purchase price, together and in isolation, preclude recovery.

Finally, Sellers contend that Fairfield is entitled to summary judgment because Buyers' fail to present evidence from which a jury could conclude Buyers' damages were foreseeable at contract formation. Sellers provide that it is Buyers' burden to come forward with admissible evidence that demonstrates that Fairfield breached and that the breach resulted in damages that are "a natural and proximate cause of [the] breach," Zelnick v. Morristown-Beard Sch., 445 N.J. Super. 250, 260-61 (2015). Sellers allege that there is no evidence of financial loss foreseeable at the time of contract formation, nor could there be due to Trugman attributing all damages to the conduct of the professionals and opining that "but for" the professionals' conduct, there would not have been a loss.

The Court does not find a basis to disturb Judge Bogaard's multiple decisions finding that there exists a genuine issue of material fact regarding Buyers' claim of fraud. Fairfield and Sellers have brought multiple motions for summary judgment requesting the same relief multiple times, even addressing the same in their opposition to Buyers' motion for reconsideration. Judge Bogaard previously ruled on Sellers' arguments, and if Sellers believed that Judge Bogaard erred, they could have moved for reconsideration or leave to appeal. While Judge Bogaard made reference in his Statement of Reasons to a "scintilla of evidence," the decision did set forth that there was sufficient evidence to support the fraud claim. Judge Bogaard correctly noted Buyers' claims that Sellers misrepresented the dealership's financials and that Buyers' relied on the representation that the dealership would continue to operate normally but that Sellers' representations were false. This evidence is sufficient to permit these claims to go to a jury.

With respect to damages flowing from the claimed misrepresentations, the Buyers intend to rely on the testimony of Kevin DiPiano and Carla Clayton. Sellers maintain that both witnesses were identified as providing testimony regarding damages in their interrogatory responses. For purposes of summary judgment, the testimony is sufficient to defeat Sellers' motion. A Rule 104 hearing will be necessary prior to any testimony at trial to determine whether the witness' testimony is proper under Rule 701. Sellers may also raise the admission of any testimony by Gary Trugman to the trial judge. While it appears there is no basis to permit Trugman to testify against Sellers as his report and testimony focused on the accountants, whether Trugman should testify at trial is left to the discretion of the trial judge based on the evidence and testimony presented at trial.

Finally, the Court notes that Judge Bogaard consistently stayed the collection of damages under the Note until the trial is concluded. Sellers have not presented any basis to disturb Judge Bogaard's multiple rulings on this issue. Thus, Seller's motion for summary judgment is denied.

IV. CONCLUSION

Accordingly, the Court grants BDC and Ginsberg's motions for summary judgment and denies Sellers'.