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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0251-14T2

KISHA DOCKERY,

Plaintiff-Appellant,

v.

KIM'S BEAUTY SUPPLY and
UNIVERSAL BEAUTY PRODUCTS, INC.,

Defendants-Respondents.

Argued September 24, 2015 - Decided October 27, 2015

Before Judges Ostrer, Haas and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1349-11.

Carleen M. Steward argued the cause for appellant (Fruhschein & Steward, LLC, attorneys; Ms. Steward, of counsel and on the brief).

Stephen A. Rudolph argued the cause for respondent Kim's Beauty Supply (Rudolph & Kayal, P.A., attorneys; Mr. Rudolph, on the brief).

Abigail Rossman argued the cause for respondent Universal Beauty Products, Inc. (Haworth, Coleman & Gerstman, LLC, attorneys; Scott L. Haworth, of counsel and on the brief; Ms. Rossman, on the brief).

PER CURIAM

Plaintiff Kisha Dockery appeals two orders granting summary judgment in favor of defendants. We affirm.

We discern the following facts derived from the motion record. In December 2009, plaintiff went to defendant Kim's Beauty Supply (Kim's) to purchase a haircare product called "ISO Plus," a spray that she previously used on many occasions to remove a hair weave. Kim's did not have the ISO Plus product in stock, so the salesperson told plaintiff about another product which would serve the same function, the "Salon Pro 30 SEC Super Hair Bond Remover" (Salon Pro 30). Plaintiff then purchased a four-ounce bottle of Salon Pro 30 from Kim's.

Salon Pro 30 is manufactured by defendant Universal Beauty Products, Inc. (Universal). Unlike the ISO Plus spray, the Salon Pro 30 product used by plaintiff was more akin to a gel-like substance. Salon Pro 30 is labeled "Professional Use Only" and at the time of purchase, plaintiff was not asked to furnish a certification or license indicating she was a professional. Prior to the incident at issue here, Kim's required purchasers of Salon Pro 30 to provide proof of a license to purchase Salon Pro 30. However, due to low sales, the practice of requiring proof of a license was no longer employed by Kim's at the time in 2009 when plaintiff made her purchase. Salon Pro 30's manufacturer's label included a warning "to keep (the product)

away from open flames or sparks." The label also warned users to apply the product with a "Q-tip." Plaintiff testified at her deposition that she "never read the label" on the Salon Pro 30 and it was not common for her to read the labels on the products in her home.

A few days after her purchase, plaintiff applied Salon Pro 30 to her hair line to remove her weave. Plaintiff used almost the entire four-ounce bottle in the process. After successfully removing her weave, plaintiff ran a comb through her hair. In keeping with her prior practice, plaintiff collected the dead hair, placed the hair in an ashtray on the table, and lit the hair on fire. In the past, plaintiff was not burned by following this procedure. However, her friend, a licensed beautician, warned plaintiff on prior occasions that burning her dead hair was dangerous. Her friend told plaintiff not to burn dead hair when using haircare products because there are "flammable things around."

After burning the dead hair, plaintiff intentionally tipped the ashtray onto the floor. When asked during her deposition why she knocked the ashtray to the ground, plaintiff responded, "I don't know." When plaintiff walked toward the ashtray, she

testified that her head became engulfed in flames.[1] Plaintiff was subsequently transported by the Trenton Emergency Medical Service (EMS) to the hospital and treated for burns to her head, face, neck and back.

Plaintiff filed a complaint against Kim's and Universal, seeking recovery for the injuries sustained following her use of Salon Pro 30. Thereafter, plaintiff filed a second amended complaint. The amended complaint averred negligence, as to Kim’s (count one); negligence, as to Universal (count two); negligence, as to John Doe Owners (1-10) and/or Responsible Parties (1-10) (count three); products liability, failure to warn, as to Universal (count four); products liability, failure to warn, as to Kim’s (count five); products liability, defective design, as to Universal (count six); breach of implied warranty, as to Kim's and Universal (count seven); and breach of express warranty, as to Kim's and Universal (count eight).

The matter proceeded with discovery, including the exchange of answers to interrogatories, depositions, and the service of

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[1] Plaintiff testified at her disposition, "I put, um, the hair in an ashtray. I lit it. I knocked it off the table. I walked over and I looked and the next thing I know, I was on fire." During the deposition of Michael Szabo, a Trenton Emergency Medical Technician (EMT) who treated plaintiff immediately following the incident, Szabo testified that he recorded plaintiff's version of the incident in his patient care report. According to the report, the plaintiff stated that she was using a hair spray product when she lit a cigarette catching her hair on fire.

expert reports. When discovery was complete, Kim's moved for summary judgment. Universal filed a partial opposition to the motion. Universal then submitted a cross-motion for partial summary judgment as to counts two, four and seven of the second amended complaint.

Prior to the motion hearing, plaintiff's counsel conceded that the New Jersey Product Liability Act (PLA), N.J.S.A. 2A:58C-1 to -11, did not apply to Kim's. As a result, the hearing focused primarily on plaintiff's remaining negligence claim against Kim's. Following oral argument, the judge found that both of plaintiff's negligence claims were without merit, as plaintiff's conduct was an intervening cause and defendants owed plaintiff no duty.

In determining that plaintiff's behavior constituted an intervening cause, the judge reasoned:

> Number one, [Salon Pro 30] said for professional use only. It didn't say for professional sale only. Number two, I am aware of no such statute. I think there's products out there all over the place that say for professional use only[.] [A]nd number three, I may even agree . . . if Ms. Dockery put this on her head, there were no flames, sparks, heat sources, there's no lighter that she lit and all of a sudden it burned her skin. It went up in flames and she wasn't near any type of . . . heat source or fire.
>
> There is an intervening cause here. She takes a lighter, she sets her hair purposely on fire and she purposely knocks the ashtray

> off the table. There's even more than one intervening cause because - you know, it may not have even been the fire she initially set, although that could be it — but then she knocks it off, yet and then she goes over towards it.
>
> I don't see how any reasonable jury could find that it was [defendants'] negligence, that they should have policed that she was definitely buying this product and making sure it went to the hands of her beautician for use. And the use wasn't even the problem, as I said. The problem was, she set a flammable material on fire.
>
> Even if . . . she did that after she had . . . something that didn't say for professional use only and it had the same, maybe, content. . . . It could have happened the same way. She set it on fire. It clearly said it was flammable, do not use around flame, sparks, whatever. So I just don't see . . . that a reasonable jury could find that Kim's negligent or that Universal, you know, by putting it into the stream . . . .
>
> . . . .
>
> But now I'm going with plaintiff's version of the facts and under her version, I don't see proximate cause, other than . . . by her setting the hair on fire.

Moreover, regarding the existence of a duty of care, the judge opined:

> [W]ell I don't think there is a duty, but also, even if there were a duty, they're selling to her was not proximate cause. Her lighting it on fire is the proximate cause, but I don't even think there was a duty [] — because otherwise you're saying . . . every seller has a duty not to sell an item that says professional use only to a consumer.

Following oral argument, the judge entered an order granting summary judgment in favor of Kim's, dismissing any and all claims and counterclaims with prejudice. Partial summary judgment was also granted to Universal regarding counts two, four and seven of the second amended complaint.

Universal then moved to preclude plaintiff's liability expert, and for summary judgment with respect to the remaining claims, counts six and eight. The judge held the opinion was a net opinion and precluded the proffered expert testimony. As a result of that decision, the judge also held that plaintiff failed to meet the burden of proof required for a defective design claim. Additionally, the judge ruled there was no proof of a breach of express warranty. The judge granted Universal's motion for summary judgment.

In precluding plaintiff's expert testimony and dismissing the defective design claim, the judge determined:

> But just because somebody's qualified doesn't mean that the report that they write is not a net opinion. And the way I read it I think it is a net opinion because he can't just say well if it were thicker, if it was a gel this wouldn't have happened without citing to some studies, without citing to some experiments that he provided, he did.
>
> So I just think that he doesn't provide the analysis. What he provides is a net opinion and for that reason as well I would find that the plaintiff has not — and the plaintiff does have the burden to prove the

> design defect and the alternative design and they have not done so.
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> So for that reason I am granting summary judgment.

On appeal, plaintiff argues the motion judge erred in deciding the issue of proximate cause. Plaintiff also contends the judge incorrectly ruled that plaintiff's liability expert proffered a net opinion. Further, plaintiff argues the judge erred in dismissing plaintiff's claims under the PLA and granting Kim's and Universal's motions for summary judgment.

In ruling on a summary judgment motion, the motion judge must decide whether there is a genuine issue of fact or, instead, whether the moving party is entitled to judgment as a matter of law. R. 4:46-2(c). The motion 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 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). The court must give the non-moving party the benefit of all favorable inferences. Id. at 536. But "when 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." Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)).

An appellate court reviews a grant of summary judgment de novo, using the same standard as the trial court. Turner v. Wong, 363 N.J. Super. 186, 198-99 (App. Div. 2003). Thus, the appellate court must determine whether a genuine issue of material fact is present and, if not, evaluate whether the lower court's ruling on the law was correct. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

We first address plaintiff's contention that the trial court erred in deciding the issue of proximate cause with respect to her common law negligence claim. Plaintiff argues the injuries she sustained would not have occurred but for Kim's selling Salon Pro 30 to her and Universal placing the product in the stream of commerce. She contends she was injured while using Salon Pro 30 due to Kim's negligence in selling her the haircare product and Universal's negligence in selling the product to retail shops without impressing upon the shops that the product was for professional use only. We disagree.

In order to establish a common law negligence claim, a plaintiff must prove 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. Cnty. of Essex, 196 N.J. 569, 584 (2008)). The Court has defined "proximate cause" as "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." Townsend, supra, 221 N.J. at 51 (citation and internal quotation marks omitted). Questions of proximate cause are generally issues for the jury. Beadling v. William Bowman Assocs., 355 N.J. Super. 70, 88 (App. Div. 2002). However, a court may grant summary judgment where there is no genuine issue about proximate cause. Brill, supra, 142 N.J. at 545.

Viewing the facts in a light most favorable to plaintiff, there is no genuine issue of material fact in dispute that would cause reasonable minds to differ as to the cause of plaintiff's unfortunate injuries. As the motion judge determined, and we concur, plaintiff's undisputed misuse of the product by its application and disregard of the warnings constituted an intervening cause that would defeat her negligence claims against Kim's and Universal to the extent there was any basis for such claims.

Plaintiff next argues the judge erred in precluding her liability expert. She contends that her expert relied on the factual evidence in the case, as well as Material Safety Data Sheets (MSDS), the Guide for Fire and Explosion Investigations and an analysis of defendants' experts' reports, when rendering

his expert opinion. As such, plaintiff argues the opinion was not a net opinion. Again, we disagree.

It is accepted that "[e]videntiary decisions are reviewed under the abuse of discretion standard because, from its genesis, the decision to admit or exclude evidence is one firmly entrusted to the trial court's discretion." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383-84 (2010). "Under this standard, 'an appellate court should not substitute its own judgment for that of the trial court, unless the trial court's ruling was so wide of the mark that a manifest denial of justice resulted.'" Hanisko v. Billy Casper Golf Mgmt., Inc., 437 N.J. Super. 349, 362 (App. Div. 2014) (quoting State v. Brown, 170 N.J. 138, 147 (2001)). "However, [w]hen the trial court fails to apply the proper test in analyzing the admissibility of proffered evidence, our review is de novo." Konop v. Rosen, 425 N.J. Super. 391, 401 (App. Div. 2012) (alteration in original) (internal quotation marks omitted).

A determination on the admissibility of expert testimony is committed to the sound discretion of the trial court. Townsend, supra, 221 N.J. at 52. (citing State v. Berry, 140 N.J. 280, 293 (1995)). A trial court's grant or denial of a motion to preclude expert testimony is entitled to deference on appellate review. Ibid. The Court has instructed, "[W]e apply [a] deferential approach to a trial court's decision to admit expert

testimony, reviewing it against an abuse of discretion standard." Townsend, supra, 221 N.J. at 53 (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371-72 (2011)).

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. N.J.R.E. 702 identifies when expert testimony is permissible, and requires the experts to be qualified in their respective fields. "N.J.R.E. 703 addresses the foundation for expert testimony. It mandates that expert 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.'" Townsend, supra, 221 N.J. at 53 (quoting Polzo, supra, 196 N.J. at 583).

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." Id. at 53-54. Pursuant to the net opinion rule, an expert is required to "'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Id. at 54 (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)); see also Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 410 (2014) (quoting Pomerantz Paper Corp.,

supra, 207 N.J. at 372). "The net opinion rule, however, mandates 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, supra, 221 N.J. at 55 (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992)). In short, the net opinion rule is "'a prohibition against speculative testimony.'" Harte v. Hand, 433 N.J. Super. 457, 465 (App. Div. 2013) (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div.), certif. denied, 154 N.J. 607 (1997)).

Applying these principles, the trial court correctly found that plaintiff's opinion qualified as a net opinion. In the expert's report, he opined that plaintiff's smoldering hair was the ignition source of the Salon Pro 30's vapors, and that the product should have contained more thickening agents to reduce its volatility. The expert analyzed and relied upon materials, such as the MSDS and the defendants' experts' reports, as support for his opinion. Notwithstanding, we note the expert report did not cite to any scientific or objective data that substantiated the opinions and theories contained therein. For example, the expert's theory of ignition, and proposed alternative design for the Salon Pro 30 product, lacked reference to any outside source or any testing. The report failed to identify the requisite bases for the opinion. In the

absence thereof, the opinion was speculative and therefore unreliable as an aid to the fact-finder. See N.J.R.E. 703; Townsend, supra, 221 N.J. at 53-55.

Plaintiff also argues that the judge erred in dismissing her PLA claims. The judge held the failure to warn claim as to both defendants lacked merit, and plaintiff was unable to meet her burden of persuasion on a defective design claim against Universal due to the lack of expert testimony.

A cause of action for failure to warn and defective design is governed by the PLA. Under N.J.S.A. 2A:58C-2, a plaintiff can prove a product is defective in one of three ways:

> A manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it: a. deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or b. failed to contain adequate warnings or instructions, or c. was designed in a defective manner.

The elements for proving a product defect are essentially the same for both a design defect and a failure to warn claim. See Jurado v. W. Gear. Works, 131 N.J. 375, 385 (1993). A plaintiff must prove: (1) the product was defective; (2) the defect existed when the product left the hands of the defendant; and (3) the defect caused injury to a reasonably foreseeable

user. Ibid. In a failure to warn case, "the duty to warn is premised on the notion that a product is defective absent an adequate warning for foreseeable users that 'the product can potentially cause injury.'" Clark v. Safety-Kleen Corp., 179 N.J. 318, 336 (2004) (quoting Coffman v. Keene Corp., 133 N.J. 581, 593-94 (1993)). In cases involving design defect claims, "plaintiff must show specifically that the product '"is not reasonably fit, suitable and safe for its intended or reasonably foreseeable purposes . . . ."'" Jurado, supra, 131 N.J. at 385 (quoting Michalko v. Cooke Color & Chemical Corp., 91 N.J. 386, 394 (1982)).

The product's label clearly stated, "WARNING: Keep away from open flames or sparks." By any objective analysis, this warning placed the consumer on notice that exposing the product to fire could potentially cause injury. Finally, plaintiff was unable to show that the product was unfit for its intended or reasonably foreseeable purpose in the absence of qualified expert testimony, which, for reasons noted above, she failed to produce.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION