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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3639-14T4

HOA T. TRAN and DUY K. TRAN,

Plaintiffs-Appellants,

v.

JENNY NGUYEN, PHUONG NGUYEN,
BICH HA NGUYEN, CARDINAL SYSTEMS
INC., and JET LINE PRODUCTS, INC.,

Defendants,

and

THE POOL & SPA DOCTOR, LLC,
and POOL WORLD, INC.,

Defendants-Respondents.

Submitted February 7, 2017 – Decided January 23, 2018

Before Judges Fisher, Ostrer, and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Docket No.
L-5262-11.

James C. DeZao, attorney for appellants.

Shafer Glazer, LLP, attorneys for respondent
The Pool & Spa Doctor, LLC (David A. Glazer,
on the brief).

Smith, Stratton, Wise, Heher & Brennan, LLP,
attorneys for respondent Pool World, Inc.
(Thomas E. Hastings, on the brief).

The opinion of the court was delivered by
LEONE, J.A.D.

Plaintiffs Hoa T. Tran and his wife Duy K. Tran appeal the December 5, 2014 order barring the reports and testimony of plaintiffs' expert Maria Bella pursuant to N.J.R.E. 702. Plaintiffs also appeal the March 9, 2015 orders granting summary judgment in favor of defendants The Pool & Spa Doctor LLC (TPSD) and Pool World, Inc. (Pool World) (collectively "defendants"). We affirm.¹

I.

The following facts are taken from the opinions of the trial court and the parties' undisputed facts. In 2004, TPSD installed an in-ground pool at the residence of defendants Jenny Nguyen, Phuong Nguyen, and Bich Ha Nguyen. Pool World installed a replacement liner in 2008.

Plaintiff knew how to swim and dive. He had swum in pools many times before. He knew that pools had shallow ends and deep ends, and that it was not safe to dive in the shallow end. On

¹ We will refer to Hoa as "plaintiff" because he alone was physically injured and because his wife brought only a loss of consortium claim.

June 20, 2010, he was at the Nguyens' pool, had a clear view, and was able to see the whole inside of the pool all the way to the bottom. He dove into the pool, swam to the end of the pool, and knew which end was the deep end and which was the shallow end. Later that evening, after drinking several beers and some liquor, he dove into the shallow end of the pool, striking his head on the bottom and sustaining severe injuries.

Plaintiff filed a complaint against both TPSD and Pool World, alleging failure to warn, negligence, breach of implied warranty, and strict liability. Plaintiff also sued the Nguyens and pool manufacturers Cardinal Systems, Inc. and Jet Line Products, Inc., but apparently dismissed the action against them.

Plaintiff proffered reports from his expert Bella. One report addressed TPSD, and the other report addressed Pool World.

Bella's report regarding TPSD asserted that a rope and float line was required because it "demarcates the transition zone between shallow and deep water," and that "[p]roper instructional and warning signs, strategically placed, provide product users with critical safety information." A photo taken August 17, 2010, showed the pool had warning signs stating "SHALLOW WATER / NO DIVING / Diving may cause death, paralysis or permanent injury" with a symbol of a diver's head hitting the bottom of the pool. Bella alleged "[t]he word DANGER and red prohibition symbols are

no longer visible" because the signs "were damaged by the sun and/or chemical bleaching."²

Bella noted that a TPSD technician had been at the Nguyen's pool about two weeks before plaintiff's injury because the pump seal was leaking and the water was green. Bella asserted the technician "should have recognized [the warning signs] were damaged," "instructed Nguyen to install proper warning signage and informed his employer of this critical safety issue so that Nguyen would be notified in writing of the unsafe condition created by the lack of proper warnings." Bella concluded TPSD's "failure to ensure that the swimming pool had anchors for the required rope and float line," and TSPD's "failure to instruct Nguyen to replace damaged safety warning signage at her swimming pool," each "was improper, violated New Jersey code, the aquatic industry standard of care, and created a dangerous condition at Nguyen's swimming pool."

Bella's report regarding Pool World cited its installation of the new liner in 2008. Bella concluded that "[b]y failing to install, or instruct the Nguyens to install, proper 'No Diving'

² The record also contains a photo of a sign on the fence stating "DANGER / NO DIVING / Diving may result in permanent injury or death. Always enter the pool FEET FIRST. . . . To avoid serious injury all pool users must know and follow these safety rules." Bella did not address this sign.

warning signage, Pool World, Inc. violated the aquatic industry standard of care," and "created a defective product and dangerous condition at the Nguyen's swimming pool."

The trial court entered its December 5, 2014 orders granting defendants' motions to strike Bella's reports and testimony without hearing oral argument or issuing an opinion. Plaintiffs moved for reconsideration, and the court heard argument and issued an oral opinion on February 20, 2015, explaining why it initially granted the motions, and entered a written order denying reconsideration on April 23, 2015. Meanwhile, the court granted the summary judgment motions of TPSD and Pool World on March 9, 2015. This appeal followed.

II.

We first address the trial court's exclusion of Bella's expert reports and proposed testimony. "When, as in this case, a trial court is 'confronted with an evidence determination precedent to ruling on a summary judgment motion,' it 'squarely must address the evidence decision first.'" Townsend v. Pierre, 221 N.J. 36, 53 (2015) (citation omitted). "Appellate review of the trial court's decisions proceeds in the same sequence, with the evidentiary issue resolved first, followed by the summary judgment determination of the trial court." Ibid.

"The admission or exclusion of expert testimony is committed to the sound discretion of the trial court." Id. at 52. "[A] trial court's grant or denial of a motion to strike expert testimony is entitled to deference on appellate review." Ibid. Accordingly, we review a trial court's decision whether to admit expert testimony under "'an abuse of discretion standard.'" Id. at 53 (citation omitted). We must hew to that standard of review.

"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.'" Townsend, 221 N.J. at 53-54 (citation omitted). Thus, "an 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, 372 (2011).

Further, the net opinion "rule requires that an expert "'give the why and wherefore" that supports the opinion, "rather than a mere conclusion."'" Townsend, 221 N.J. at 54 (citation omitted). Under the rule, "a trial court must ensure that an expert is not permitted to express speculative opinions or personal views[.]" Id. at 55. Thus, "an expert offers an inadmissible net opinion if he or she 'cannot offer objective support for his or her opinions, but testifies only to a view about a standard that is

"personal."" Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 410 (2014) (quoting Pomerantz, 207 N.J. at 372). Experts "must be able to point to generally accepted, objective standards of practice and not merely standards personal to them." Riley v. Keenan, 406 N.J. Super. 281, 296 (App. Div. 2009).

The trial court ruled "Bella fail[ed] to recognize that there is no standard or law that requires warning signs to be placed on residential pools." Bella's report regarding TPSD cited the National Swimming Pool Institute (NSPI) Service Tech Manual, which displayed "examples of appropriate safety signage" and recommended: "Ask your customers to post NSPI safety signs and to follow these guidelines: . . . Post all . . . warning signs . . . near the pool." As the court noted, this was a suggestion, not a mandate. As the manual placed the duty of posting the warning signs on the pool owner, it cannot support imposing such a duty on the pool installer. See Davis, 219 N.J. at 412 (rejecting an expert's opinion that inspectors had a duty where the standards cited by the expert placed the duty on the property owner). Moreover, the trial court found it was "undisputed that both Pool World and [TPSD] provided packets of warning stickers and

instructions" to the Nguyens.³ Finally, it was uncontested when a pool liner is replaced, the warning stickers that were applied directly to the old liner would be removed. As TPSD did not install the replacement liner in 2008, any failure in 2004 to place signs on the pool liner was irrelevant to plaintiff's accident.

Next, Bella cited ANSI⁴ Z535.4 American National Standard Product Safety Signs and Labels, which states: "A product safety sign or label should alert persons to a specific hazard, the degree or level of hazard seriousness, the probable consequences of involvement with the hazard, and how the hazard can be avoided." However, all of those warnings were included on the warning signs on the pool in 2010.

Bella asserted that "ANSI Z535.4 requires that the word DANGER be white letters on a red background."⁵ Bella further asserted "when that red background fades due to sun and/or chemical exposure, the signal word [DANGER] disappears into the white label

³ Plaintiff also submitted booklets from NSPI and the Association of Pool and Spa Professionals, but they simply "recommended" to pool owners that "you should post 'No Diving' signs."

⁴ ANSI stands for the American National Standards Institute.

⁵ Bella similarly notes ANSI Z535.3 requires that the prohibition symbol include a "safety red or black circular band with slash."

background. To properly maintain warnings, a process of periodic inspection and replacement must be followed."

However, nothing in ANSI Z535.4 requires a pool installer to undertake periodic maintenance and replacement of signs six years after installation. In any event, as the trial court noted, the ANSI Z535.4 standard was never adopted in New Jersey's building code. Cf. Costantino v. Ventriglia, 324 N.J. Super. 437, 442-43 (App. Div. 1999) (allowing an expert to base opinions on OSHA regulations because "OSHA regulations have long been admissible as evidence of an industry standard for safety.").

Bella contended the TSPD technician who came to repair the pump should have warned the Nguyens to replace damaged safety warnings. Bella noted TSPD was a member of the Northeast Pool and Spa Association (NESPA), and referenced a NESPA letter stating: "You, as the professional servicing the pool/spa, have the liability to inform your customer of any unsafe condition." However, Bella provided no context for this letter, nor any reason to believe it refers to damaged signs.

Bella also cited ANSI/NSPI-5, which required installation of a rope and float line in pools with certain slope changes. Unlike the other provisions plaintiff cited, ANSI/NSPI-5 has been adopted in New Jersey's building code. See N.J.A.C. 5:23-3.14(b)(22)(iii), § 3109.4 (2003) ("In-ground residential pools

shall be designed and constructed in conformance with ANSI/NSPI-5"). The trial court determined that "ANSI/NSPI-5 does not mandate signage on residential pools and does not require that an installer of a pool or a company that provides maintenance must direct the owners to replace warning signs." This further showed Bella's opinions regarding warning signs were based only on personal standards. Where a standard has been adopted by a New Jersey code, "any departure from that standard requires [proper] expert testimony." Davis, 219 N.J. at 409, 411-12 (rejecting an expert's claim that a duty arose from standards adopted in New Jersey's fire code where those standards made "no mention" of the claimed duty).⁶

Based on ANSI/NSPI-5, Bella opined that "TPSD should have installed the anchors" for a rope and float line. However, TPSD presented uncontested evidence that it installed the anchors in

⁶ Plaintiff's appellate brief cites ANSI/NPSI-5's Appendix D's statement: "If warning signs are chosen as a means to warn against shallow water diving, the signage should be in compliance with ANSI Z535 1998 Series of standards for safety signs and colors or the latest revision." S.R. Smith, Selected Sections From American National Standard for Residential Inground Swimming Pools ANSI/NSPI-5 2003 6 (Oct. 2003), <http://www.divingboardsafety.net/Standard-inground-pools.pdf>. However, Appendix D simply indicates warning signs are "[r]ecommended," and added: "The use of warning signs, as a device to warn against shallow water diving is still an open question before the Human Factors Society and others as to whether or not signage is an effective means that will modify human behavior to prevent accidents." Ibid. In any event, Bella did not cite Appendix D to the trial court.

2004. As the trial court noted, "Bella simply concludes without factual support that [TPSD] fail[ed] to ensure that the pool had anchors for the required rope and float line." Moreover, it was undisputed that such anchors are put on the deck, that when a deck is replaced the anchors would likely be removed, and that the Nguyens' deck was renovated, "added to and/or replaced" in 2008. Thus, Bella could not show negligence by TPSD based on the absence of those anchors when Bella inspected the pool in 2012.

Moreover, the trial court correctly noted, Bella "fail[ed] to explain the causal connection between that and the incident in question." The net-opinion rule "frequently focuses . . . on the failure of the expert to explain "a causal connection between the act or incident complained of and the injury or damage allegedly resulting therefrom." Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). The trial court properly rejected Bella's "testimony as a net opinion to the extent that [s]he speculated on the issue of causation." See Townsend, 221 N.J. at 57.⁷

Bella's expert report regarding Pool World suffered from similar flaws. Bella again cited ANSI Z535.4 regarding warning signs. However, its general content requirements were met by the

⁷ The trial court recognized and did not contravene the "rebuttable 'heeding presumption' in products-liability, failure-to-warn cases." James v. Bessemer Processing Co., 155 N.J. 279, 297 (1998).

warning signs on the Nguyen's pool; New Jersey has not adopted its standard; and it does not require liner installers to undertake periodic maintenance of such signs years after installation. Bella also asserted a provision of ANSI/NPSI-5 incorporated an NSPI workmanship guideline that "[t]he builder shall advise the owner in writing of any other deficiencies or unsafe conditions." Even assuming that guideline applied to Pool World, Bella offered no basis to believe it would encompass warning signs.

Bella also referenced instructions from the liner manufacturer, requiring that "'No Diving' signage . . . must be installed," and stating "'No Diving' signage is a component of the swimming pool and must be installed on the coping and deck surface around the perimeter of your pool as illustrated above." Bella also cited a "Pool Dealer Checklist" item: "The 'No Diving' stickers have been installed around the perimeter of the pool in accordance with the provided instructions." Finally, Bella cited an "Introduction to the Builder," which stated: "The Owner/Installer must read and follow the instructions," including delivering the safety "package to the customer and review[ing] its contents with them," including the "'No Diving' decals and instructions." Even assuming those documents from the manufacturer required the liner installer to install the warning

signs, or at least to review them with the customer who owned the pool, they did not create a legal duty of care.⁸

Bella lastly referenced Matthew Seiden's Product Safety for Engineers and Managers: A Practical Handbook and Guide, which identifies three "fundamental rules of practice for safe design," including that "[i]f you can't [eliminate or] guard the hazard, warn or instruct the user as to the dangers of the product under reasonably foreseeable conditions of service and commerce." However, Bella made no effort to show a general handbook's generic principle set a legal standard of care for swimming pool liner installers.

Thus, the trial court properly ruled that "Bella fail[ed] to identify any standard that required the installer of a pool liner to also install a number of warnings around the perimeter of a residential pool or instruct the owner to install warnings." The court correctly concluded there was "no basis for her assertion

⁸ With regard to TPSD and the rope and float line, Bella noted that "a manufacturer's recommendations for the installation of any material or assembly may be considered to be accepted engineering practice[.]" N.J.A.C. 5:23-3.6(b). Bella made no such assertion regarding Pool World and the warning signs. In any event, that regulation does not make a manufacturer's recommendation the only accepted engineering practice; indeed, it applies only when the building code is "silent," and "shall not be read to overrule" the building code, which is "the primary guide to accepted engineering practice[.]" N.J.A.C. 5:23-3.6(a), (b).

that [TPSD or Pool World] had a duty to instruct the homeowner to install or replace warning stickers."

Plaintiffs argue Bella's reports should not have been excluded because any deficiencies were mere fodder for cross-examination. However, Bella founded her opinions on inapplicable standards.⁹ "Given the weight that a jury may accord to expert testimony, a trial court must ensure that an expert is not permitted to express speculative opinions or personal views that are unfounded in the record." Townsend, 221 N.J. at 54-55 (differentiating such lack of foundation from minor "omissions" which may be the subject of cross-examination). Because Bella failed to provide any "generally accepted, objective standards of practice," the trial court did not abuse its discretion when it barred Bella's expert reports. Riley, 406 N.J. Super. at 296.¹⁰

III.

We next address the trial court's grant of summary judgment for defendants. Summary judgment must be granted if the court determines "that there is no genuine issue as to any material fact

⁹ Cf. Scully v. Fitzgerald, 179 N.J. 114, 127-29 (2004) (holding a fire expert "is not required to identify a fire or building code or other statutory standard to establish a duty" where the danger of fire was "a matter of common knowledge").

¹⁰ Plaintiff also has not shown the denial of reconsideration was an abuse of discretion. See Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996).

challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, 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, 523 (1995). "[W]e review the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016).

A plaintiff must present expert testimony to "establish the requisite standard of care and [the defendants'] deviation from that standard" if "'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 [defendants] was reasonable.'" Davis, 219 N.J. at 407 (citations omitted).

The proper construction and maintenance of a swimming pool "'constitutes a complex process involving assessment of a myriad of factors' that 'is beyond the ken of the average juror'" and thus requires expert testimony. See id. at 408 (citation omitted). Whether and what warnings against diving are required to be placed

on swimming pools is a complex matter on which expert testimony is commonly presented. See, e.g., Ryan v. KDI Sylvan Pools, Inc., 121 N.J. 276, 281-90 (1990) (reversing the exclusion of expert testimony on the necessity of diving warnings); Tighe v. Peterson, 356 N.J. Super. 322, 325-28 (App. Div. 2002) (rejecting that plaintiff's "expert opinion created a jury issue on defendants' liability" for lack of dive warnings); Vallillo v. Muskin Corp., 218 N.J. Super. 472, 476-77 (App. Div. 1987) (relying on expert testimony about the need for diving warnings).¹¹

Here, as plaintiff's expert attempted to demonstrate, whether warnings are required on pools implicates industry and legal guidelines outside the ken of the average juror. The trial court did not err in rejecting the notion that "the knowledge and experience of the jurors, unaided by expert testimony, provides a sufficient basis to determine the factual issue, in this case the need for or adequacy of warnings." Macri v. Ames McDonough Co., 211 N.J. Super. 636, 643 (App. Div. 1986).

¹¹ Plaintiff cites swimming pool cases from other jurisdictions, but to the extent they discuss the expert issue they merely find the plaintiff's expert testimony established the need for warnings. E.g., Corbin v. Coleco Indus., 748 F.2d 411, 417-18, 420 (7th Cir. 1984); Bunch v. Hoffinger Indus., Inc., 20 Cal. Rptr. 3d 780, 786-87, 800 (Ct. App. 2004); Jonathan v. Kvaal, 403 N.W.2d 256, 258 (Minn. Ct. App. 1987).

Bella's net "opinion is inadmissible and 'insufficient to satisfy a plaintiff's burden on a motion for summary judgment.'" Satec, Inc. v. Hanover Ins. Grp., Inc., 450 N.J. Super. 319, 330 (App. Div. 2017) (citation omitted). Absent Bella's opinion, "plaintiffs are unable to satisfy their burden of establishing the applicable standard of care and a breach of that standard," and "defendants are entitled to judgment as a matter of law." Davis, 219 N.J. at 414. Thus, summary judgment was appropriate. Therefore, it is irrelevant who installed warning signs or whether plaintiff saw them, because any issue of fact was not material to the outcome.

Plaintiffs' remaining arguments lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION