NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

	:	SUPERIOR COURT OF NEW JERSEY
THE ESTATE OF SUSAN NILER, ET AL.,	:	LAW DIVISION
Plaintiff,	:	
	:	ESSEX COUNTY
v.	:	DOCKET NO.: L-007405-16
TOWNSHIP OF MILLBURN, ET AL.	:	**OPINION**
Defendants.	:	

Decided: July 14, 2020

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By: The Honorable Thomas R. Vena, J.S.C.

Preliminary Statement

This matter is before the Court on Plaintiff, The Estate of Susan Niler's ("Plaintiff") Motion to Bar Defendant's Expert Reports and Defendant, Township of Millburn's ("Defendant"), Cross Motion to Bar Plaintiff's Expert Reports.

Statement of Facts

This matter arises out of the death of Susan Niler ("Mrs. Niler"). On or about July 10, 2015, Mrs. Niler was driving on Brookside Drive in Millburn, New Jersey. Brookside Drive intersects the South Mountain Reservation. The South Mountain Reservation is owned and maintained by Essex County. While Mrs. Niler was driving, a tree in the South Mountain Reservation fell over and landed on her car. She was impaled by the tree's branch and trapped in the driver seat of her car. Though she was not immediately killed, she suffered a serious abdominal injury, multiple contusions and abrasions to various areas of the body. An autopsy would later conclude the cause of death was "blunt impact injuries to the torso."

The accident occurred at about 6:32 in the morning. Millburn Police Officer Del Plato was the first to arrive at the scene, followed shortly by the Millburn Fire Department at 6:48 and the paramedics at 6:52. Captain Steven Pagnillo ("Pagnillo") of the Millburn Fire Department assessed the scene, requested additional fire engines and manpower and concluded paramedics could not access Mrs. Niler until the tree was removed. For the most part, the tree blocked Mrs. Niler from sight, however, a firefighter, Stephen Jason ("Jason"), was able to administer oxygen to her. During their interaction, Mrs. Niler was alert and talking.

Defendant states that Jason and Pagnillo could not access the passenger side of the car because there were downed electrical wires near the door. It should be noted that Plaintiff's expert disagrees with that contention. Nevertheless, the plan to aid Mrs. Niler involved Pagnillo

removing the branches that encapsulated the vehicle so that Jason could extract her from the vehicle. Both Pagnillo and Jason knew that Mrs. Niler was impaled, but neither knew that the branch that impaled her broke off from the tree. However, Jason was aware that Mrs. Niler's seatbelt – to some extent - was holding the branch in place. Nonetheless, Pagnillo removed the branches from the door, and cut the post between the driver and the rear doors. After he removed both doors, the seatbelt discharged and the branch fell out of Mrs. Niler's wound. She began to bleed profusely and slowly lost consciousness. Jason testified that if he knew the branch was not connected to the tree, he would have taken different measures to secure the branch to Mrs. Niler.

In response, the paramedics ordered a "rapid take down." At this point, Mrs. Niler still registered a pulse. The paramedics on the scene took over care of Mrs. Niler and she was ambulanced to Morristown Memorial Hospital. She was pronounced dead at 7:40 in the morning.

Plaintiff initiated this action on October 26, 2016. The complaint alleged wrongful death, survivorship and loss of consortium claims. On January 24, 2017, Plaintiff voluntarily dismissed Defendant from the case without prejudice, only to reinstate Defendant on December 5, 2018. Moreover, Plaintiff filed an amended complaint, alleging (1) wrongful death; (2) survival; (3) loss of consortium; (4) wrongful death under the theory that aid was not given or improperly given; (5) survival under the theory that aid was not given or improperly given; (6) wrongful death under the theory that Mrs. Niler's life was not rescued or saved; and (7) survival under the theory that Mrs. Niler's life was not rescued or saved.

On December 20, 2020, the Court heard oral argument on Defendant's Motion for Summary Judgment and Plaintiff's Cross Motion for Summary Judgment. The Court held that there were numerous genuine issues of material fact and denied both motions.

Now, the Court is again faced with cross motions. However, here, both Plaintiff and Defendant seek to bar their adversary's expert reports.

Legal Arguments

I. Plaintiff's Motion to Bar

First, Plaintiff argues that Defendant's expert witnesses should be barred for noncompliance with N.J.R.E. 702. According to Rule 702, and *DeHanes v Rothman*, 158 N.J. 90, 100 (1999), three elements must be met before expert testimony can be admitted: (1) the testimony must concern a subject matter that is beyond the knowledge of the average juror; (2) the expert's testimony must be sufficient reliable; and (3) the expert must have sufficient expertise in the field of study.

According to Plaintiff, the report of Defendant's Accident Reconstructionist Expert Shawn F. Harrington ("Mr. Harrington") shows Mr. Harrington has no background in extrication or impalements. Although he is a volunteer firefighter and qualified in accident reconstruction, he lacks the sufficient knowledge to testify as a Firefighter expert. He is not a certified firefighter; is not sufficiently schooled and has never issued an expert report regarding a firefighter's actions handling an impalement or extrication. In fact, he testified that he does not consider himself a firefighter expert, and Defendant stated that it hired Mr. Harrington to "reflect accident reconstruction" but not to evaluate the firefighter's extrication techniques.

Furthermore, Plaintiff argues that Mr. Harrington's report does not evaluate Jason's treatment of the impalement, rather only his decision to create access to Mrs. Niler's car. To Plaintiff, Defendant hired an accident reconstructionist to testify as to whether the vehicle was cut correctly, not whether the extrication was performed safely. This is inconsequential to

Plaintiff's claims. The extrication of an impaled victim is the central issue – a subject that is outside of Mr. Harrington's area of expertise.

Next, Plaintiff argues Defendant's medical expert, Dr. Angelo Scotti ("Dr. Scotti") lacks the sufficient knowledge and expertise to act as a rebuttal witness to Plaintiff's trauma surgeon. Dr. Scotti is specialized in internal medicine. He does not perform surgeries, has not worked in an emergency room since 1992, has not been board certified in emergency medicine since 2008 and has not worked in a trauma ward since 1976. He is not qualified as a surgeon to remove impaled objects. Finally, he attributes Mrs. Niler's death to "bleeding from the aorta and atrial rupture" but he has never performed a heart surgery and has not dealt with atrial ruptures since prior to 1992.

According to Plaintiff, although Dr. Scotti is underqualified and did not personally evaluate Mrs. Niler, his conclusions deviate from the pathologist who personally evaluated Mrs. Niler. To Plaintiff, this showcases that Dr. Scotti is not in a position to opine on whether or not Mrs. Niler could have survived her injuries if proper procedures were followed.

For those reasons, Plaintiff argues that Defendant's experts should be barred from testifying at trial. Furthermore, without experts, Defendant is incapable of rebutting Plaintiff's claim of liability.

II. Defendants' Opposition and Cross Motion to Bar

A. Opposition

Defendant argues Plaintiff's characterization of its experts is misleading and incorrect. First, Defendant notes that while an expert witness is generally a licensed professional in the field of study, it need not be. According to *Garden Howe Urban Renewal Assocs., LLC v HACBM Architects Eng'rs Planners, LLC*, 439 N.J. Super. 446, 456 (App. Div. 2015), licensed,

or unlicensed, individuals in another field can testify as an expert depending on the claim, allegations made and the expert's opinion. *See also Rosenberg v Cahill*, 99 N.J. 318, 331-332 (1985) (holding a medical doctor was competent as an expert in a malpractice claim against a chiropractor). Thereafter, the weight of an expert's testimony rests with the jury. *See City of Long Branch v Jui Yung Liu*, 203 N.J. 464 (2010).

It is Plaintiff's belief that Mr. Harrington is unqualified to testify because he is not a licensed and certified firefighter. Defendant contends this disregards Mr. Harrington's experience and credentials: he has a degree in Engineering Science; is a nationally certified firefighter and emergency first responder; and a certified basic vehicle rescue technician. Contrary to Plaintiff's belief, Mr. Harrington was tasked with not only recreating the accident but also determining whether a proper extrication was performed. In fact, he testified to the same. In his report, he relies on the National Fire Protection Agency Manual and his own expertise to outline the three methods of extricating a trapped individual. After his analysis, he concludes the extrication performed by the firefighters was the "most viable solution."

Furthermore, contrary to Plaintiff's assertions, Mr. Harrington testified that he has experience with, and expertise in, impalements. He has taken "a number of courses" on the subject, presented courses on the subject and dealt with impalements in his capacity as a volunteer firefighter. Plaintiff believes that Defendant did not properly extricate Mrs. Niler; Mr. Harrington's opinion directly addresses that issue.

Next, as to Dr. Scotti, Plaintiff argues he cannot act as an expert because he is not currently treating patients with similar conditions. However, this argument is unsupported by legal authority. Similarly, Plaintiff argues Dr. Scotti is unqualified a an expert in the field, ignoring the fact that he is Board Certified in both internal medicine and emergency medicine.

Dr. Scotti has 15 years of emergency room experience and has treated impalements before. Using his knowledge and expertise, he drafted a report concluding Mrs. Niler would have died regardless of whether the branch was removed.

B. Cross Motion

Defendant argues Plaintiff's Forensic Economics Report must be barred because it was not produced in discovery. This violates Rule 4:24-1(b) and the Court's Order establishing a discovery schedule, including the production of expert reports. Thus, if the report is utilized at trial, it would unduly prejudice Defendant. *See* N.J.R.E. 403.

Next, Defendant contends Plaintiff's expert, Kenneth Kandrac ("Mr. Kandrac") does not possess the requisite qualifications to render an opinion on the proximate cause of Mrs. Niler's death. According to Mr. Kandrac's Curriculum Vitae, he has no medical training or expertise. Rather, he has specialized knowledge on Fire Science, Arsons and Fire Investigations. This knowledge is insufficient to qualify Mr. Kandrac to testify that Defendant proximately caused Mrs. Niler's death.

In addition, Mr. Kandrac's report is a net opinion, as it fails to demonstrate the validity of his reasoning. *See In re Accutane Litig*., 243 N.J. 340 (2018). Likewise, it fails the factor-analysis outlined in *Daubert v Merrell Dow Pharm., Inc.* 509 U.S. 579 (1993). His report fails to include a reliable factual basis or methodology to conclude Defendant acted with gross negligence. In fact, he argues on behalf of gross negligence, yet, in his deposition he failed to offer an adequate definition of the term.

Furthermore, in his deposition, Mr. Kandrac testified that he had no basis to conclude firefighter Jason's training was inadequate; he deviated from his training or that any member of

Defendant caused Mrs. Niler's injuries. Thus, his opinion is simply conjecture and he should be barred from testifying at trial.

Legal Analysis

A. Barring Expert Testimony:

The admission and exclusion of expert testimony lies in the discretion of the trial court and is entitled to deference on appellate review. *See State v Berry*, 140 N.J. 280 (1995); *Bender v Adelson*, 187 N.J. 411 (2006). However, a Court's analysis must be guided by Rules of Evidence 702 and 703 and the net opinion doctrine.

Pursuant to Rule 702, "[if] scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." N.J.R.E. 702. Next, Rule 703 addresses the foundation for expert testimony. To be admissible, 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.'" *Townsend v. Pierre*, 221 N.J. 36, 53 (2015) (Internal citation omitted).

Thereafter, the Courts established a corollary to Rule 703: the net opinion doctrine. A net opinion is an "expert's bare conclusions, unsupported by factual evidence." *Buckelew v. Grossbard*, 87 N.J. 512, 524 (1981). The net opinion rule "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* 221 N.J. at 55. For example, an expert's opinion was found inadmissible because it was based on personal views and a "rule of thumb." *Alpine Country Club v. Borough of Demarest,* 354 N.J.Super. 387 (App.Div.2002). Another was

inadmissible because it lacked a factual foundation and amounted to nothing more than conjecture. *See Dawson v. Bunker Hill Plaza Assocs.,* 289 N.J.Super. 309 (App. Div. 1996).

The net opinion standard is not perfection. *Townsend* 221 N.J. at 55. A Court's sole task is gatekeeping sound evidence; but the credibility, weight and probative value of the testimony is in the hands of the jury. *Espinal v. Arias*, 391 N.J. Super. 49, 58 (App. Div. 2007).

Pertinent here, the New Jersey Supreme Court recognized that "when the subject matter of the expert testimony 'falls distinctly within the province of a particular profession,' then generally 'the [expert] witness must be a licensed member of the profession whose standards he professes to know.'" *Rosenberg by Rosenberg v. Cahill*, 99 N.J. 318, 328 (1985) *quoting Sanzari v. Rosenfeld*, 34 N.J. 128, 136 (1961). "However… in areas in which professions 'overlap,' a member of one profession who is 'familiar with the situation in issue' would be competent to testify as to the 'accepted practice' applicable to a member of the other profession." *Id*.

B. Substantive Analysis

i. Mr. Harrington

First, Mr. Harrington's report is neither a net opinion nor in violation of Rules 702 and 703. The report detailed "accident reconstruction and emergency responder procedures." From his report and deposition testimony, the Court is satisfied that Mr. Harrington's analysis is not conjecture. To draft his report, he considered deposition transcripts, incident reports, photographs and medical documentation. Using that permissible foundation, he then applied his technical knowledge – on an issue certainly outside the scope of an average juror's knowledge – to conclude "the strategy implemented to access and extricate the patient was the most viable solution."

To the extent that Plaintiff argues Mr. Harrington is not a licensed, active-duty firefighter, there is an obvious "overlap" between his professional and technical experience and the experience of an expert on firefighters and their professional tactics. *See Sanzari v. Rosenfeld*, 34 N.J. 128, 136 (1961).

More importantly, the net opinion rule "does not mandate that an expert organize or support an opinion in a particular manner that opposing counsel deems preferable." *Townsend* 221 N.J. at 54. Plaintiff's concerns about Mr. Harrington's level of experience with impalements and the alleged deficiencies in his report should be addressed on cross examination. *See Rubanick v Witco Chem. Corp.,* 242 N.J. 36 (1997).

ii. Dr. Scotti

The Court agrees with Defendant's opposition to the barring of Dr. Scotti's opinion: it is not substantiated by sound legal argument. Plaintiff contends that Dr. Scotti's absence from an emergency room since the beginning of his medical career upends his opinion. However, Plaintiff makes no reference to a comparable case wherein an expert's hiatus from active employment in his field of study is detrimental to the testimony or report. Dr. Scotti analyzed the facts of the case, and the autopsy report, and applied his own scientific and medical knowledge to conclude Defendant did not proximately cause Mrs. Niler's death. Or rather, her injuries were such that she would have died even if the branch were not removed.

The fact that he did not personally treat or evaluate Mrs. Niler is not inconsequential, but it also does not render his opinion net. *See Rubanick* 242 N.J. at 54 (holding a doctor does not have to personally treat a patient to render a scientific opinion at to the cause of illness or death). Once again, Plaintiff's concerns about the deficiencies of the report should be addressed on cross-examination. *See generally Id.*

iii. Forensic Economics Report

As the parties note, Defendant was an original named party in Plaintiff's Complaint. However, on January 31, 2017, Plaintiff filed a stipulation of dismissal, without prejudice, as to Defendant. Thereafter, on November 30, 2018, the Honorable Judge Annette Scoca granted Plaintiff's Motion to Reinstate Defendant and File an Amended Complaint.

In the time that Defendant was not an active party in the case, a considerable amount of discovery was exchanged, including Plaintiff's Economics Report. It is not disputed that Plaintiff did not supply Defendant with the report. Plaintiff contends Defendant did not actively participate in discovery. It did not request interrogatories or depose any of Plaintiff's witnesses. Plaintiff believed this passive effort was due to the fact that co-Defendant, Essex County, sent the discovery to Defendant. The belief was corroborated by Defendant's Summary Judgment Motion that utilized discovery provided in the period Defendant was not a party to the case.

In response, Defendant argues that Plaintiff violated Rule 4:24-1(b) which states a "party filing a pleading that joins a new party to the action shall serve a copy of all discovery materials on or otherwise make them available to the new party within 20 days after service of the new party's initial pleading." N.J. Court Rules, R. 4:24-1. Defendant argues, in more colorful language, that it is not their responsibility to provide the discovery.

Defendant's argument is correct: pursuant to Rule 4:24-1 Plaintiff is responsible for providing the documents. Likewise, there can be no extension of discovery after an arbitration or trial date is fixed, unless exceptional circumstances are shown. R. 4:24-1(c) Plaintiff's contention that the Forensic Report was "made available" is not persuasive. That being said, the Court is persuaded by Plaintiff's argument that it genuinely believed Defendant had all the necessary discovery. If a party is dismissed for nearly two years of a case, does not seek additional,

substantive discovery and relies on discovery accomplished during the period of time it was out of the case for a Motion for Summary Judgment, it is a reasonable belief that the party has all discovery.

Yet, a reasonable belief is not grounds for a relaxation of the rules. A Court is only permitted to relax or "[dispense] with" a rule if adherence would result in an injustice. N.J. Court Rules, R. 1:1-2. The Court is satisfied that if Plaintiff is not permitted to use the Economic Report, it could lead to an injustice. Thus, a relaxation of the R. 4:24-1(c) discovery restrictions after a fixed trial date is appropriate. Although the Court is not convinced Plaintiff accurately pled exceptional circumstances, justice and fairness compels the Court to deny Defendant's application to bar.

Finally, Defendant's contention that it would be unduly prejudiced is not persuasive. The unfortunate reality of the situation is that it is highly unlikely for this case to be tried on November 9, 2020. It is increasingly unlikely that this case can, logistically, be tried within the next few months. For that reason, Defendant will be afforded ample time to review and rebut the Economics Report.

iv. Mr. Kandrac

According to Mr. Kandrac's report, he was hired to "record professional opinions as to the Conduct of the Millburn Fire Department." It is obvious to the Court that Mr. Kandrac is qualified as an expert on Emergency and Fire Rescue situations due to his extensive experience. His report thoroughly analyzes the facts of the case and applies the "Vehicular Extrication Guidelines" to the Defendant's actions. Defendant argues that Mr. Kandrac's testimony should be barred, in part, because he is offering medical opinions. Yet, the report only suggests Defendant's actions "created an unreasonable risk of harm, and in fact, were injurious to Mrs.

Niler." His training and expertise on the field renders him capable of submitting this opinion because it is based on demonstrated methodologies. *See Townsend* 221 N.J. at 55.

To the extent he were to testify on the underlying medical issues involved with the injuries, his testimony would be barred because he is not qualified in that field. However, that is not the subject matter of his report. Moreover, any related issues can be addressed on cross-examination.

Conclusion

For all of the foregoing reasons, on the basis of the authority cited herein and the argument of counsel, Plaintiff's Motion to Bar and Defendant's Cross Motion to Bar are **DENIED**.

Very Truly Yours,

Thomas R Vena

The Honorable Thomas R. Vena, J.S.C.