SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0277-21

ADEL HANNA,

Plaintiff-Appellant,

v.

WOODLAND COMMUNITY ASSOCIATION, DIVERSIFIED PROPERTY MANAGEMENT, and A. GUZZO LANDSCAPING, LLC,

Defendants-Respondents,

and

WOODLAND COMMUNITY ASSOCIATION and DIVERSIFIED PROPERTY MANAGEMENT,

Defendants/Third-Party Plaintiff-Respondents,

v.

A. GUZZO LANDSCAPING, LLC,

Defendant/Third-Party Defendant-Respondent.

_____

Argued October 4, 2022 – Decided November 17, 2022

Before Judges Geiger, Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-3036-18.

Robert Y. Cook argued the cause for appellant (Levinson Axelrod, PA, attorneys; Matthew P. Pietrowski and Robert Y. Cook, on the briefs).

Caitlin A. Harley argued the cause for respondents Woodland Community Association and Diversified Property Management (Kent & McBride, PC, attorneys; Jay D. Branderbit and Caitlin A. Harley, on the brief).

Karen M. Maschke argued the cause for respondent A. Guzzo Landscaping, LLC (MacDonald & Herforth, attorneys; Karen M. Maschke, on the brief).

PER CURIAM

In this appeal we are asked to determine whether the trial court erred in granting summary judgment to all defendants pursuant to the "ongoing storm rule" enunciated by the Supreme Court in the recent case of Pareja v. Princeton Int'l Props., 246 N.J. 546 (2021). We conclude the trial court was correct in granting summary judgment to A. Guzzo Landscaping, LLC and affirm. We reverse the summary judgment granted to Woodland Community Association and Diversified Property Management because a genuine issue of material fact

exists as to whether plaintiff fell on ice from a previous storm, an exception to the ongoing storm rule.

Plaintiff Adel Hanna fell in the parking lot of the Woodland condominium complex on January 7, 2017. The property is owned by Woodland Community Association (Woodland) and managed by Diversified Property Management (DPM). Woodland contracted with A. Guzzo Landscaping, LLC (Guzzo) to provide snow and ice removal services. Hanna was a resident of the community and fell while walking through snow to his daughter's house within the community.

In granting summary judgment to the defendants, the trial judge relied almost exclusively on the New Jersey Supreme Court's recent decision in Pareja, where the Court adopted the "ongoing storm rule," acknowledging "commercial landowners do not have a duty to remove the accumulation of snow and ice until the conclusion of the storm." Pareja, 246 N.J. at 558.

The trial court analogized the facts in this case to those in Pareja, specifically comparing the dual-storm nature of the two storms on January 6 and 7 to the facts in Pareja and stating Pareja implied the "same factual circumstances" as the back-to-back storms here because "[Pareja]'s incident occurred between [two] winter weather events." Because Hanna fell within an

hour after the snow stopped falling on January 7, the trial court found defendants did not owe him a duty pursuant to the ongoing storm rule.

The trial court acknowledged the exception to the on-going storm rule exists for a pre-existing storm but stated: "[t]here is no credible evidence in this record supporting the existence of 'left over' ice from the January 6th storm." The trial court stated that "[u]nlike here" there was "actually" concealed ice in Pareja as Pareja was "unable to see ice on the driveway apron . . . ." The trial court found plaintiff's meteorologist report regarding ice forming after the January 6 storm but before the January 7 snow began "does not have any foundation and is mere speculation on this record."

The trial court concluded:

> There is no credible observation, or sighting that supports the [p]laintiff's expert's opinion there was, in fact, pre-existing ice from the January 6th storm. Indeed, the [c]ourt finds the [p]laintiff's expert's opinion in that regard amounts to an inadmissible net opinion. The [c]ourt finds the opinion is unfounded speculation.

This appeal follows.

Hanna claims the trial court erred in finding the on-going storm rule applies to this case, and, even if it does, genuine issues of material fact preclude summary judgment as to whether he fell on ice from a pre-existing storm. Hanna

also argues the trial court erred in sua sponte determining his expert report was not credible and amounted to a net opinion.

We review orders granting summary judgment de novo and apply the same standard as the trial court. Lee v. Brown, 232 N.J. 114, 126 (2018). Summary judgment will be granted if, viewing the evidence in the light most favorable to the non-moving party, "there is no genuine issue of material fact and 'the moving party is entitled to a judgment or order as a matter of law.'" Conley v. Guerrero, 228 N.J. 339, 346 (2017) (quoting Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016); R. 4:46-2(c)). To determine whether there are genuine issues of material fact, we 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." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

"An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would

require submission of the issue to the trier of fact.'" Grande v. St. Clare's Health Sys., 230 N.J. 1, 24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)).

The weather forecast for January 6, 2017 called for snow in the morning, with the day's temperatures reaching a peak in the mid-30s and then falling below freezing at night. The snow on January 6 stopped falling at approximately 5:30 a.m. and left approximately one inch of snow. The parties do not dispute Guzzo was not called out to perform any snow or ice remediation.[1] In fact, no defendant took any remedial steps with respect to the one inch of snow that fell on the ground. Temperatures on January 6 rose above freezing during the day. The plaintiff's expert report states: "The temperature moderated to an afternoon high in the mid-30s. A combination of some sunshine and the above-freezing temperatures resulted in a portion of the residual snow cover to melt and generate runoff snow-melt water . . . . " The temperatures then fell below freezing at approximately 5:00 p.m. The weather forecast for January 7 called for snow to begin early in the morning and continue during the day. On the 7th, snow fell from approximately 4:30 a.m. to 6:00 p.m., leaving about seven inches of snow. The temperatures that day were "well below freezing." On the 7th,

[1] Woodland's contract with Guzzo allowed Woodland to request removal or remediation services if the snowfall was less than two inches. Guzzo had no contractual obligation until the fallen precipitation exceeded two inches.

Guzzo plowed the 75-acre Woodland complex from approximately 11:00 a.m. to midnight. Between 6 and 7 p.m. on the evening of January 7, Hanna attempted to walk to his daughter's house approximately "four minutes away" on foot. He stated he was "about 15 yards" away from his daughter's home when the accident occurred. The parking lot[2] he was walking through had not yet been plowed. Plaintiff slipped on "snow and ice" and was injured.[3]

Hanna, through his expert, asserts he slipped on ice that formed on the evening of January 6, when the one inch of snow that fell that morning melted then refroze. That ice was covered over by the snow on January 7.

On appeal, Hanna alleges the on-going storm rule did not relieve defendants of their duty to maintain the common elements of the condominium pursuant to N.J.S.A. 46:8B-14(a). He argues defendants are liable with respect to the January 7 snowfall despite the ongoing storm rule because: 1) the ongoing

---

[2] It is undisputed Hanna chose to walk across the unplowed parking lot and not use any sidewalks. The condition of the sidewalks at the time of the fall is not in the record before us. Although defendants' briefs are replete with arguments regarding Hanna's contributory fault, it is inappropriate to consider contributory fault when deciding a motion for summary judgment since it pertains to proximate cause, a jury issue.

[3] Hanna's virtual deposition was taken with the aid of an Arabic language interpreter. Although his attorney attempted to clarify the record several times, it is clear language precision was an issue.

storm rule applies exclusively to the common law duty of commercial landowners to clear public sidewalks abutting their property, not condominium associations; 2) the rule is inapplicable here because the snow had stopped falling when plaintiff fell; and 3) the rule does not alleviate Guzzo's duty to perform its work in reasonably safe manner, regardless of ongoing snowfall. We disagree. All of those arguments fail due to the on-going storm rule.

Condominium associations owe a statutory duty to their residents to maintain common elements pursuant to the Condominium Act. Lechler v. 303 Sunset Ave. Condo. Ass'n, Inc., 452 N.J. Super. 574, 577 (App. Div. 2017); N.J.S.A. 46:8B-14(a). "Common elements" include "parking areas and driveways." N.J.S.A. 46:8B-3(d)(iii). Regulations for the maintenance of multiple dwellings—including condominiums, N.J.S.A. 55:13A-3(k)—make it the "duty of the owner or operator to keep the premises free of . . . icy conditions [and] uncleared snow . . . on . . . parking lots and parking areas." N.J.A.C. 5:10-1.4(a), -6.4(a)(4).

The duty considered by the Supreme Court in Pareja is the common law duty of commercial landowners to clear snow from public sidewalks abutting their property established in Mirza v. Filmore Corp., 92 N.J. 390, 400 (1983). Pareja, 246 N.J. at 555–56. Hanna argues Woodland and DPM's duties, in

contrast, are derived from statute and regulation. N.J.S.A. 46:8B-14(a); N.J.A.C. 5:10-1.4(a), -6.4(a)(4). Specifically, he refers to N.J.A.C. 5:10-6.1 (elimination of hazards) for the language:

> The owner of any . . . multiple dwelling shall be responsible **at all times** for keeping all parts of the premises occupied by himself or other persons, to the extent of his responsibilities described herein, clean and **free of** infestation and **hazards to the health or safety of occupants** and other persons in or near the premises.
>
> [(emphasis in the brief).]

Hanna's position is belied by our caselaw consistently holding condominium associations to the same premises liability standards as commercial landowners. The language of Pareja rejects plaintiff's distinction. In adopting the ongoing storm rule, the Supreme Court ruled: "we state today that, under the ongoing storm rule, commercial landowners do not have a duty to remove the accumulation of snow and ice until the conclusion of the storm." Pareja, 246 N.J. at 558. The Court did not exclude condominium associations from the definition of commercial landowners. On the contrary, New Jersey law has consistently recognized the distinction between private residential and commercial properties for purpose of common law premises liability; condominium associations fall in the latter category. See Qian v. Toll Bros.

Inc., 223 N.J. 124, 136 (2015) (citing Luchejko v. City of Hoboken, 207 N.J. 191 (2011)). The accident in Luchejko involved a slip and fall on a public sidewalk abutting a 104-unit condominium. There the Supreme Court held the condominium association was responsible for "maintaining the 'common elements of the property,'" which did not include the public sidewalk. Luchejko, 207 N.J. at 196-98. Qian expanded on the holdings in Luchejko and Mirza, concluding where a sidewalk constitutes a "common area" pursuant to the homeowner's association's by-laws, common law premises liability law squarely places "responsibility to clear the private sidewalks of accumulated snow and ice" on the association. Qian at 141-42. In Pareja, the Court cited Qian for the proposition that our case law imposes a duty on "homeowners' association and its management company . . . to clear snow and ice from the private sidewalks abutting its land" while recognizing "that liability has not been extended to residential landowners," further reenforcing the residential/commercial common law premises liability dichotomy and categorizing homeowner associations in the latter group. Pareja, 246 N.J. at 556.

The Supreme Court in Pareja recognized removing snow during an ongoing storm is an "impossible burden" and "categorically inexpedient and impractical." Id. at 557, 558. It found the ongoing storm rule was "consistent

with our case law" "[g]iven the unreasonableness of removing the accumulation of snow and ice while a storm is ongoing." Id. at 558. The "Sisyphean" task, id. at 553, of removing snow while it is still snowing is just as burdensome to condominium owners as it is to other commercial landowners. Imposing a higher burden on condominium associations because of their statutory obligation to unit owners cannot lessen the realities of that burden.

Hanna's argument that the ongoing storm rule does not apply because he fell after the snow had concluded was rejected by the Court, which described the ongoing storm rule as suspending a landowner's duty "until a reasonable time after the cessation of precipitation" and said the landowner's duty arises "within a reasonable time after the storm." Pareja, 246 N.J. at 548, 558. The ruling makes clear landowners need not have all snow and ice cleared the moment snow stops falling. Plaintiff fell within an hour after the snow stopped according to his own expert reports. The Woodland complex is seventy-five acres, two-thirds of which are roadways and parking areas. Guzzo arrived at 11 a.m. and spent over twenty-four hours plowing Woodland on January 7 and 8th. Although we decline to reach the definition of "reasonable time" in the context of the on-going storm rule, given the facts before us, we conclude an hour after a seven-

inch snowstorm has fallen on a 75-acre commercial property is not a reasonable time to have completed all snow removal activities.

Hanna's final argument for relief not predicated on the pre-existing risk exception to the on-going storm rule is that Guzzo did not perform its work in a reasonably safe manner, arguing Guzzo violated its contractually imposed duty to clear snow in a reasonably safe manner because the snow was not cleared when plaintiff fell. His attempt to remove Guzzo's duty from Pareja's reach by claiming the contractual obligation existed regardless of Woodland or DPM's common law duty defies logic. Firstly, it is undisputed Guzzo began snow remediation at 11 a.m. on January 7, approximately seven hours before the storm ended. He does not claim any wrongdoing by Guzzo besides the alleged failure to clear the snow prior to his fall. Secondly, commercial landowners regularly contract with snow removal providers, who have the appropriate equipment and expertise to address weather conditions. Limiting the on-going storm rule to commercial landowners but not their contracted snow removal service providers would nullify the import of the Supreme Court's ruling.

Because Pareja's ongoing storm rule applies to condominium associations and affords commercial landowners and their contracted professionals reasonable time to clear snow following the cessation of a storm, we find

Woodland, DPM, and Guzzo did not have a duty to clear the snow that fell on January 7 before Hanna fell in the parking lot an hour after the snow ended.

Hanna argues, in the alternative, if the on-going storm rule applies to the facts of this case, he fell on ice that formed and went untreated from a pre-existing storm, an exception to the on-going storm rule. The trial court acknowledged the exception for pre-existing snow and ice conditions in Pareja but found no evidence in the record to support plaintiff's position.

With respect to Guzzo, it is undisputed Guzzo did not have a duty to remediate any ice or snow from the January 6 storm, as it was not called by Woodland or DPM to treat any ice or snow from the pre-existing storm. Woodland could have contracted with Guzzo for additional monitoring of weather conditions and treatment of ice conditions but did not. There are no genuine issues of material fact as to Guzzo's duty for any pre-existing conditions and we affirm summary judgment in its favor.

A key question in assessing the remaining defendants' potential liability pursuant to the pre-existing risk exception to the ongoing storm rule is whether any facts, viewed in the light most favorable to plaintiff, could support a finding the January 6 storm actually created a pre-existing risk. Resolution of that

question, for the purpose of summary judgment, is dependent upon plaintiff's experts' meteorology reports.

When "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.'" Schwartz v. Menas, 251 N.J. 556, 569 (2022) (quoting Townsend v. Pierre, 221 N.J. 36, 53 (2015)). "Appellate review . . . proceeds in the same sequence, with the evidentiary issue resolved first, followed by the summary judgment determination of the trial court." Ibid. [4]

"[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." Rodriguez v. Wal-Mart Stores, Inc., 237 N.J. 35, 57 (2019) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 383–84 (2010)). "However, no deference is accorded when the trial court fails to properly analyze the admissibility of the

[4] The trial court asserted that "summary judgment motions must be supported by relevant and admissible evidence." However, the caselaw it cited for that proposition addressed affidavits in support of motions for summary judgment, which must be admissible under Rule 1:6-6. El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 164 (App. Div. 2005); Claypotch v. Heller, Inc., 360 N.J. Super. 472, 489 (App. Div. 2003). Expert reports are not relevant to Rule 1:6-6. M.A. v. Estate of A.C., 274 N.J. Super. 245, 251 (App. Div. 1993) (citing Baldyga v. Oldman, 261 N.J. Super. 259, 265 (App. Div. 1993)).

proffered evidence." E&H Steel Corp. v. PSEG Fossil, LLC, 455 N.J. Super. 12, 25 (App. Div. 2018).

An expert opinion must be grounded in "'facts or data derived from (1) the expert's personal observations, or (2) evidence submitted 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, 221 N.J. at 53 (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)); N.J.R.E 703. A corollary to that requirement is the net opinion rule, "which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." Ibid. An expert must "'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)).

The trial court sua sponte found one of the two expert reports was a net opinion. In doing so, it impermissibly weighed the credibility of the report and found it lacking. It did not provide a true analysis of the admissibility of the report. The entirety of the trial court's analysis was "[t]here is no credible observation, or sighting that supports the [p]laintiff's expert's opinion" and "[i]ndeed, the [c]ourt finds the [p]laintiff's expert's opinion in [regard to ice

forming the night of the 6th] amounts to an inadmissible net opinion. The [c]ourt finds the opinion is unfounded speculation." The trial court's decision is bereft of any discussion about why the opinion was "unfounded speculation."

Data is consistently relied upon by experts in establishing their opinions. See N.J.R.E. 702; N.J.R.E. 703; See also, Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36, 49 (App. Div. 1990) ("the need for supporting data and factual basis for the expert's opinion is especially important when the opinion is seeking to establish a cause-and-effect relationship.") In fact, courts often take judicial notice of data such as weather conditions. N.J.R.E. 201(b)(2) (the trial court may judicially notice "such facts as are so generally known or of such common notoriety within the area pertinent to the event that they cannot reasonably be the subject of dispute . . . .").

The expert at issue is a "Senior Forensic Meteorologist" at WeatherWorks and an "[American Meteorological Society] Certified Consulting Meteorologist." After providing detailed National Weather Service data for the relevant area for January 6 and 7, the expert explained those conditions led to untreated snow melting while temperatures were above freezing and then refreezing at night when the temperature dropped. He also explained the temperatures "well below-freezing" the next day caused the second storm's snow

to be "dry and powdery" allowing it to "accumulate[] on top of the residual snow and ice cover from the January 6 storm." The trial court disregarded the expert report by stating, in full:

> there is no credible observation, or sighting that supports the plaintiff's expert opinion there was, in fact, pre-existing ice from the January 6th storm. Indeed, the court finds the plaintiff's expert's opinion in that regard amounts to an inadmissible net opinion. The court finds the opinion is unfounded speculation.

The trial court abused discretion with respect to this evidentiary decision because it ruled an observation was necessary to establish the opinion. Absent a first-hand observation of ice prior to January 7, which would obviate the need for any expert testimony, the expert relied upon data which is the type of data normally relied upon by experts in this field. The trial court gives no indication of what supporting facts are missing from the report. An experienced meteorologist used specific data to opine on whether ice was formed. If that is "unfounded speculation," it is difficult to conceive how an expert could adequately opine on whether certain ice was formed prior to an ongoing storm, which would seriously undermine the application of Pareja's pre-existing risk exception. The Court in Pareja specifically stated, "[o]ur rule today does not preclude a jury from hearing questions of fact such as . . . whether the

accumulation of snow or ice was from a previous storm." Pareja, 246 N.J. at 559.

Further, despite the trial judge's statement that "[t]here is no credible observation, or sighting" of ice from the January 6 storm, he did find that plaintiff "saw ice on the ground after he fell." A reasonable inference from that finding is appropriate for summary judgment, the ice Hanna saw was from the January 6 storm. When that ice formed is a genuine issue of material fact precluding summary judgment. Pareja, 246 N.J. at 559; Conley, 228 N.J. at 346.

Hanna's meteorology report is not a net opinion. Affording Hanna all reasonable inferences, the ice Hanna observed could have formed before the January 7 snowfall, imposing a duty on Woodland and DMP to address and mitigate ice accumulation.

Summary judgment is affirmed as to Guzzo. Summary judgment is reversed as to Woodland and DMP and the matter is remanded for trial consistent with our conclusions. We do not retain jurisdiction.