SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2001-20

PAOMAR KONTEH,

Plaintiff-Appellant,

v.

McCOLLISTER'S TECHNICAL SERVICES, INC. d/b/a McCOLLISTER'S TRANSPORTATION SYSTEMS, INC.,

Defendant-Respondent.

Argued March 3, 2022 – Decided May 24, 2022

Before Judges Haas and Alvarez.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-8152-18.

Michael Confusione argued the cause for appellant (Hegge & Confusione, LLC, attorneys; Michael Confusione, of counsel and on the brief).

Edward F. Ryan argued the cause for respondent (O'Toole Scrivo, LLC, attorneys; Jeffrey C. Maziarz and Edward F. Ryan, of counsel and on the brief).

PER CURIAM

Plaintiff Paomar Konteh appeals the February 11, 2021 grant of summary judgment to defendant McCollister's Technical Services, Inc. d/b/a McCollister's Transportation Systems, Inc. The order issued in principal part because of plaintiff's failure to obtain an expert's report regarding liability. For the reasons that follow, we affirm.

On April 2, 2018, plaintiff, an independent contractor, was picking up a shipment at defendant's New Jersey warehouse location. Plaintiff had picked up deliveries there and at defendant's other location in Illinois an "uncountable" number of times. In the ten years prior, plaintiff had frequently transported in his truck certain four-wheeled computer cabinets, known as "Netshelters," for defendant. Although contested by defendant, plaintiff alleged Netshelters can weigh up to 3,000 pounds.

On this occasion, Larry Vaughan, the only available warehouse employee, asked plaintiff to help him load the cabinets. As the men were attempting to roll the first cabinet from the loading dock onto the back of the truck, it fell on plaintiff, causing him significant injuries.

Plaintiff's complaint attributed the accident to several theories of liability: (1) the ramp was "defective" because it did not have a "flat edge," and was "not

flush with the ground" (2) Vaughan did not properly align the "ramp," (3) Vaughan should not have continued pushing once the wheel became stuck, (4) Vaughan "pushed the cabinet with too much force under the circumstances," (5) defendant did not have sufficient personnel for the loading, (6) defendant did not heed warnings and did not have proper safety measures, and (7) defendant should have had a lift for heavy merchandise.

In answers to interrogatories, plaintiff said he was "caused to fall and be precipitated violently to the ground as a result of a hazardous, dangerous[,] and defective condition[.]" Plaintiff added that the Netshelter's wheel "became stuck in a crack or separation in the floor, subsequently falling on [p]laintiff's hand, bringing him to the ground and causing him to sustain serious injuries." Defendant produced a United States Department of Labor, Occupational Safety & Health Administration compliance checklist confirming that the dock plates were in proper working condition in the months prior to plaintiff's accident.

In plaintiff's uniform arbitration statement of facts,[1] plaintiff contended the dock plate "did not have all of the necessary components." Plaintiff also

[1] Rule 4:21A-4(e) only prohibits the use of arbitration statements at a subsequent trial.

claimed that defendant did not have sufficient personnel to safely load the cabinets.

When deposed, plaintiff acknowledged he had previously loaded Netshelters with the assistance of only one other person. He explained that the truck was connected to the warehouse loading dock via a dock plate that automatically lifted and lowered to form a ramp between the two. Even when properly set, it left a gap because it was not completely level with the surfaces at either end. Plaintiff said defendant's out-of-state workers always covered the gap with a piece of metal, unlike in New Jersey, where they simply pushed "with power" to get the Netshelter onto the dock plate. He explained that the Netshelter's first wheel rolled into the gap, became stuck, and fell on him.

Vaughan testified at deposition that he was rolling the Netshelter "up the dock mate, and like halfway," when it "just stopped and . . . started going over." Vaughan yelled in order to warn plaintiff, unsuccessfully attempted to keep the unit upright, and actually fell on top of it when it toppled. Vaughan said he was midway up the dock plate when the unit began to fall. He did not know if the wheel became stuck, or if one of the wheels just stopped working.

Plaintiff did not file an expert report, even though discovery was extended twice for him to do so. On April 4, 2020, the trial judge entered an order stating

that plaintiff was "to serve liability expert report, if any, by May 8, 2020." The order was drafted by defendant and entered upon its unopposed motion to extend discovery. On June 5, 2020, the judge extended discovery again, requiring plaintiff "to serve his medical expert report by no later than June 26, 2020" and to serve a liability expert report by August 15, 2020. This order, too, was entered on defendant's motion, which plaintiff did not oppose.

Following the close of discovery on September 14, 2020, the judge entered an order on October 30, 2020, barring plaintiff from serving any medical or liability expert report. This order was also unopposed.

During oral argument on the motion,[2] the judge pointed out that plaintiff was barred from serving either a medical expert report related to damages or a liability expert report. Plaintiff never responded to the two discovery orders she had previously issued or requested any extension. Additionally, plaintiff was not advancing any common knowledge argument.

In addressing plaintiff's theory of liability, the judge stated:

> [T]he plaintiff's theory is that the edge of the loading dock was not completely flush where the loading dock met the hydraulic dock plate. Plaintiff in this lawsuit . . . appears to allege that there was a height difference

[2] Defendant's motion for summary judgment included alternative bases for relief, and plaintiff cross-moved for relief under a spoliation theory. That application was denied, but is not being appealed.

> for the wheels to go over the dock plate and caused the wheels to get stuck and for the NetShelter to lose balance.
>
> It is plaintiff's burden to prove that the dock plate used by the defendant was defective or dangerous or substandard. And in this case, promoting such a theory of the elevation difference that appear to be, have been dangerous or defective does require expert evidence. This is beyond the ken of an average juror to understand what was defective or dangerous.
>
> Additionally, and it cannot be ignored, plaintiff was aware of the height difference. Plaintiff was aware, familiar with this area where the accident happened and there was no, there was no indication in this record that plaintiff was concerned about a defective condition on the property.

The judge also expressed the view that plaintiff would be unable to prove damages in the absence of a medical expert, as he claimed permanent injuries.

On appeal, plaintiff raises one point:

> POINT I
>
> THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING PLAINTIFF'S NEGLIGENCE CLAIM

A grant of summary judgment is reviewed de novo on appeal. Townsend v. Pierre, 221 N.J. 36, 59 (2015). The appellate court applies

> the same standard that governs the trial court, which requires denial of summary judgment when 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.
>
> [Ibid. (internal quotation marks omitted)]

A trial judge's decision that a party's claim requires expert testimony is reviewed for abuse of discretion. Maison v. NJ Transit Corp., 460 N.J. Super. 222, 231–32 (App. Div. 2019) ("The necessity of expert testimony is determined by the sound exercise of discretion by the trial judge."). An abuse of discretion occurs when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis. Deutsche Bank Tr. Co. Americas v. Angeles, 428 N.J. Super. 315, 319 (App. Div. 2012).

N.J.R.E. 702 provides that "[i]f 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." To be admissible, the proposed testimony must meet three criteria: (1) it 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. Jacobs v. Jersey Cent. Power & Light Co., 452 N.J. Super. 494, 504 (App. Div. 2017).

In most negligence cases, a plaintiff is not required to retain an expert to establish the applicable standard of care. See Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014). Rather, he or she need only "show what the defendant did and what the circumstances were. The applicable standard of conduct is then supplied by the jury[,] which is competent to determine what precautions a reasonably prudent man in the position of the defendant would have taken." Id. at 407 (alteration in original). In other words, the facts in a typical case are such that "a layperson's common knowledge is sufficient to permit a jury to find that the duty of care has been breached without the aid of an expert's opinion." Ibid. (quoting Giantonnio v. Taccard, 291 N.J. Super. 31, 43 (App. Div. 1996)).

In some cases, however, the jury is not competent to supply the standard by which to evaluate defendant's conduct, and the plaintiff must present the testimony of a liability expert. Ibid. To decide whether a liability expert is necessary, a court must consider "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." Ibid.

(alteration in original) (quoting Butler v. Acme Mkts., Inc., 89 N.J. 270, 283 (1982)). In such esoteric matters, the jury would have to speculate absent the aid of an expert. Ibid.

An expert report has been found to be necessary in a case in which a fatal fire was caused by the failure to report a design flaw in a sprinkler system. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 400–12 (2014). The court found an expert necessary where a plaintiff was injured while taking part in a funeral procession and claimed that the funeral home was negligent in failing to procure an escort and instruct participants. Giantonnio v. Taccard, 291 N.J. Super. 31, 37–42 (App. Div. 1996). Expert testimony is required to establish a real estate broker's duty to warn prospective buyers of the dangers of a property. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 444–45 (1993). Taccard and Hopkins were recently cited with approval by the Supreme Court in Davis. 219 N.J. at 407-08.

Plaintiff's argument that no expert is required fails, first and foremost, because of his various responses during discovery asserting inconsistent theories of liability. In addition, although the average person knows from common experience that a wheel can become stuck in a gap, causing a wheeled object to topple, the average person is not equipped to consider the physics of loading

unusually heavy objects, and the point at which a gap between flooring, or changes in elevation, become dangerous. A juror could not reasonably be expected to decide liability based on a number of different theories.

Furthermore, plaintiff was well aware of the gap, stating that workers in Illinois covered it, but workers in New Jersey did not. Even on appeal, plaintiff raises a new theory of liability—that Vaughan was using too much force in pushing the Netshelter at the time the accident occurred. Given plaintiff's own confusion regarding causation, he cannot expect jurors to address the question in a vacuum.

Summary judgment is reviewed de novo on appeal, but was premised on the trial court's finding that an expert was required, a finding we review with deference. Maison, 460 N.J. Super. at 231-32 ("The necessity of expert testimony is determined by the sound exercise of discretion by the trial judge."). Applying a deferential standard, it cannot be said that the judge abused her discretion. Plaintiff's own conduct over years demonstrated that he did not consider the gap to be dangerous, and he was unsure how much force Vaughan should have used to push the cabinet.

In a different context, an accident from pushing a heavy object over irregular flooring might not require expert testimony. But this object was

unusual. OSHA had found nothing deficient in the dock ramp, and plaintiff had used the ramp many times before to maneuver a Netshelter onto the back of his truck, even with only one person's aid. Since plaintiff himself was uncertain what caused the accident to happen, and his description conflicted with Vaughan's description and involved trucking industry standards, the need for an expert report and expert testimony was clear. Thus, the judge's decision, which we review deferentially, was not an abuse of discretion.

Affirmed.