SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2394-20

DIANE CONWAY,

Plaintiff-Appellant,

v.

MICHELE SERRA and
MARISA SERRA,

Defendants-Respondents,

and

BOROUGH OF ELMWOOD
PARK,

Defendant.

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Submitted February 16, 2022 – Decided May 20, 2022

Before Judges Hoffman and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-8912-18.

Steven H. Wolff, attorney for appellant.

O'Toole Scrivo, LLC, attorneys for respondents (Robert J. Gallop, of counsel and on the brief; Franklin D. Paez, on the brief).

PER CURIAM

Plaintiff Diane Conway appeals from the March 26, 2021 Law Division order granting the summary judgment dismissal of her bodily injury claim against defendants Michele Serra and Maria Serra.[1] Plaintiff sustained injuries when she tripped and fell on a raised sidewalk slab abutting defendants' driveway. The motion judge entered summary judgment for defendants after finding that defendants are protected from liability under the rule that residential landowners are not liable for a dangerous condition existing on an abutting sidewalk, unless they created or exacerbated the condition. We affirm.

I.

The following facts are derived from the summary judgment record, viewed in the light most favorable to plaintiff. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

In August 2018, while walking on the sidewalk in front of defendants' home, plaintiff tripped in the area of a raised concrete sidewalk slab; according

[1] Plaintiff filed this action against the Serras and the Borough of Elmwood; however, plaintiff reached a settlement agreement with the Borough. Therefore, unless otherwise specified, "defendants" refer solely to the Serras.

to plaintiff, it appeared there was a "filling" of either concrete or cement between two uneven concrete slabs. Plaintiff estimated the sidewalk had approximately one-and-a-half to two inches of raised "filled[-]in" concrete. After tripping over this filled-in concrete, plaintiff lost her balance, stumbled to the left towards defendants' driveway, then traveled approximately ten feet, fell into a bush, and landed on grass.

Plaintiff never walked over the subject sidewalk prior to her fall. Thus, plaintiff did not know how long the "filled[-]in" concrete existed before her fall, nor who performed the "filled[-]in" work on the sidewalk.

Plaintiff took a photograph of the sidewalk within one month of her accident. At her deposition, plaintiff marked the photograph with the words "fill in" to identify the precise location of her fall. She wrote the words "fill in" between the sidewalk slabs to pinpoint where the raised concrete was located. Plaintiff also marked the photograph with two "Xs" on the ends of the slabs and testified that the raised "filled in" concrete was between the two "Xs."

Plaintiff's engineering expert relied on the photograph in preparing his report, stating that "the initial repair" shown in the photograph dated May 20, 2019, "created a hazard by allowing a sidewalk repair patch to have a lip or edge raised above the flat surface." Based on this photo, he concluded that plaintiff's

fall "was the direct [result] of allowing a sidewalk patch repair to have a raised lip . . . not level with the flat surface."

At her deposition, plaintiff testified that someone made repairs to the sidewalk in the summer of 2019 because, while driving by, she observed an orange cone on the sidewalk and noticed that the sidewalk was "leveled off." However, plaintiff did not know who made the repairs to the sidewalk, nor what work the unidentified person performed on the sidewalk.

Plaintiff submitted a certification in opposition to defendants' motion for summary judgment. Plaintiff certified that "the parties performing the remediation did not appear to be anyone from Elmwood Park"; instead, "[t]he work looked to be performed by the homeowner[s] or their agents." Plaintiff further certified, "[t]he area where I fell was the driveway portion of sidewalk abutting [d]efendant[s'] residence. This portion is raised, has a lip, and I have seen it used as a driveway, with cars going over this cement that created a raised surface."

In January 2021, defendants moved for summary judgment, contending that 1) they are not liable under the rule that residential property owners are not responsible for repairing or maintaining the sidewalk along their property; 2) there is no evidence that they created a hazard on the sidewalk prior to the

accident; and 3) even if plaintiff could prove defendants made a repair to the sidewalk, plaintiff did not prove that the repair created a danger that proximately caused plaintiff's injuries.

On March 26, 2021, the motion judge granted defendants summary judgment. In a comprehensive written opinion, the judge found that the "facts and evidence presented here fail to support how, if at all, defendants contributed to the alleged dangerous condition" that caused plaintiff's fall. The judge found that plaintiff's allegation that defendants' use of their driveway contributed to the defect in the sidewalk area "was without merit." The judge further found that it is "undisputed that the [d]efendants' use of the [p]remises and sidewalk to access their driveway was solely residential in nature."

The motion judge said that he considered plaintiff's expert report, even though it was "not served in accordance with the Rules of Court[,]" and plaintiff provided "no basis for the untimely service of the purported expert report." Nevertheless, the judge rejected the substance of the report, concluding that plaintiff's expert offered a net opinion because he failed to identify any factual evidence that defendants created or exacerbated a condition on the sidewalk. Instead, plaintiff's expert assumed defendants performed a deficient repair, without drawing a comparison of the sidewalk before and after the alleged

repair. As a net opinion, plaintiff's expert report failed to provide any legitimate basis to deny summary judgment.

On appeal, plaintiff raises the following arguments:

> POINT I
>
> DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED IN WHOLE AS ISSUES OF MATERIAL FACT EXIST.
>
> a. Questions of fact exist as to the liability of the Defendants, the location of the actual incident and the destruction of the scene by the Defendants.
>
> POINT II
>
> THE SPOLIATION OF THE SUBJECT PREMISES BY DEFENDANTS RAISES AN INFERENCE SUFFICIENT TO PRECLUDE SUMMARY JUDGMENT.

II.

We review the trial court's granting of the motion de novo, applying the same legal standards that govern summary judgment motions. Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 349-50 (2016). We consider the factual record, and reasonable inferences that can be drawn from those facts, "in the light most favorable to the non-moving party" to decide whether the moving

party was entitled to judgment as a matter of law. IE Test, LLC v. Carroll, 226 N.J. 166, 184 (2016) (citing Brill, 142 N.J. at 540; R. 4:46-2(c)).

We accord no special deference to a trial judge's assessment of the documentary record, as the decision to grant or withhold summary judgment does not hinge upon a judge's determinations of the credibility of testimony rendered in court, but instead amounts to a ruling on a question of law. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (noting no "special deference" applies to a trial court's legal determinations).

To prove a claim of negligence, a plaintiff must demonstrate: 1) a duty of care, 2) that the duty has been breached, 3) proximate causation, and 4) injury. Townsend v. Pierre, 221 N.J. 36, 51 (2015). A plaintiff bears the burden of proving negligence, see Reichert v. Vegholm, 366 N.J. Super. 209, 213 (App. Div. 2004), and must prove that unreasonable acts or omissions by defendant proximately caused his or her injuries. See Camp v. Jiffy Lube No. 114, 309 N.J. Super. 305, 309-11 (App. Div. 1998).

The presence or absence of an enforceable duty is a question of law for the court. Clohesy v. Food Circus Supermarkets, Inc., 149 N.J. 496, 502 (1997); see also Doe v. XYC Corp., 382 N.J. Super. 122, 140 (App. Div. 2005).

Generally, residential homeowners are not liable for a dangerous condition of a sidewalk that borders their property. Luchejko v. City of Hoboken, 207 N.J. 191, 201-07 (2011); however, residential property owners may be liable where their actions create an artificial, dangerous condition on an abutting sidewalk. Stewart v. 104 Wallace St., Inc., 87 N.J. 146, 152 (1981).

In Luchejko, our Supreme Court held that an "overwhelmingly owner-occupied 104-unit condominium complex" must be classified as a "residential," and not a "commercial" property, for purposes of sidewalk liability principles. 207 N.J. at 195. The plaintiff in Luchejko was walking on the sidewalk in front of the condominium building when he slipped and fell on a sheet of black ice, breaking his leg. Id. at 196. Thereafter, he brought a negligence action against the non-profit condominium association responsible for the building. Ibid.

In reviewing the history of sidewalk liability in our State, the Court in Luchejko observed that "[o]ur decisions consistently reflect that residential property owners stand on different footing than commercial owners who have the ability to spread the cost of the risk through the current activities of the owner." Id. at 206. The Court further underscored that "[t]he commercial/residential dichotomy represents a fundamental choice not to impose sidewalk liability on homeowners . . . ." Id. at 208.

The Restatement (Second) of Torts (Am. Law Inst. 1965) provides the basis for this State's governing legal principles in the area of sidewalk liability. See Deberjeois v. Schneider, 254 N.J. Super. 694, 698-702 (Law Div. 1991), aff'd o.b., 260 N.J. Super. 518 (App. Div. 1992). In New Jersey, residential property owners, unlike commercial property owners, have no duty to maintain the sidewalks adjacent to their land so long as they do not affirmatively create a hazardous condition. See Deberjeois, 254 N.J. Super. at 699-701; see also Stewart, 87 N.J. at 159 (holding duty to maintain sidewalks confined to commercial property owners); Lodato v. Evesham Twp., 388 N.J. Super. 501, 507 (App. Div. 2006) (holding residential landowners remain protected by common-law public sidewalk immunity).

In Nash v. Lerner, the plaintiff alleged that a residential property owner used the sidewalk where the pedestrian was injured as part of her driveway, regularly driving over the sidewalk to reach the street, and that this use damaged the sidewalk. 311 N.J. Super. 183, 188 (App. Div. 1998), rev'd, 157 N.J. 535 (1999). Although recognizing the principle that a residential property owner could not be held liable for a deteriorated sidewalk, we found liability existed based upon an exception to that rule, i.e., that the dangerous condition was

created by the defendant's "direct use . . . of the sidewalk in such a manner as to render it unsafe for passersby." Id. at 189 (quoting Stewart, 87 N.J. at 153).

However, our Supreme Court reversed, substantially adopting the reasoning of Judge Rodriguez's dissent, which rejected the theory that a residential property owner could be liable for a defective condition created over time by the owner's use of the property. Nash, 157 N.J. at 535 (citing Nash, 311 N.J. Super. at 193–95 (Rodriguez, J., dissenting)). In his dissent, Judge Rodriguez reasoned that "[v]ehicular traffic from a driveway to and from the street over the sidewalk is not the sort of affirmative act" that subjects a residential property owner to liability for an injury on an abutting sidewalk. Ibid.

In Davis v. Pecorino, the Court held that a commercial abutting landowner could be liable for the condition of a sidewalk where the landowner creates "a dangerous or hazardous condition due to use of the public sidewalk for a special purpose related to his business activity on the property." 69 N.J. 1, 9 (1975). However, the Court did not extend this duty to residential landowners. Ibid. Here, there is no dispute that defendants' property is residential in nature and therefore protected from liability, barring any affirmative acts by defendants in creating the dangerous condition.

We find no genuine issue of material fact regarding whether defendants created or exacerbated the dangerous sidewalk condition, as the record provides no support for such a contention. Plaintiff cites to no evidence suggesting defendants created or in any way caused the raised sidewalk hazard at issue. As such, plaintiff's position lacks merit.

In addition, plaintiff's contention that defendants created the dangerous sidewalk condition by driving a motor vehicle back and forth over the point where the driveway intersects with the sidewalk also lacks merit. As noted, our Supreme Court has addressed this issue and found that "[v]ehicular traffic from a driveway to and from the street over the sidewalk" does not subject a residential property owner to liability for an injury on the sidewalk. Nash, 157 N.J. at 535 (citing Nash, 311 N.J. Super. at 193–94 (Rodriguez, J., dissenting)).

We also conclude the motion judge correctly found that the report of plaintiff's expert constituted an inadmissible net opinion. The doctrine barring the admission at trial of net opinions 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 v. Pierre, 221 N.J. 36, 53-54 (2015) (alteration in original) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 583 (2008)). The net opinion doctrine requires experts to "give the why

and wherefore" supporting their opinions, "rather than . . . mere conclusion[s]." Id. at 54 (quoting Borough of Saddle River v. 66 E. Allendale, LLC, 216 N.J. 115, 144 (2013)).

Experts must "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." Id. at 55 (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992)). An expert's conclusion should be excluded "if it is based merely on unfounded speculation and unquantified possibilities." Ibid. (quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997))

Bearing in mind "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." Ibid.; see also Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 401 (2014) ("[T]he standard of care [the expert] set forth represented only his personal view and was not founded upon any objective support. His opinion as to the applicable standard of care thus constituted an inadmissible net opinion."); Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 373 (2011) ("[I]f an expert cannot offer objective support for his or her opinions, but testifies only

to a view about a standard that is 'personal,' it fails because it is a mere net opinion.").

Plaintiff's expert report identifies no factual support for the contention that defendants repaired the sidewalk, thereby creating the raised level and resulting in the hazardous condition. Plaintiff's expert relied on two photographs taken after the accident to reach his conclusion that defendants created the hazardous sidewalk condition before plaintiff's fall. Plaintiff's expert report, based on unfounded speculation, assumes the truth of this conclusion, without providing any support for it. The expert report contains no factual bases for its conclusions, nor does it address the methodology used to reach such conclusions.

Lastly, we decline to consider plaintiff's spoliation argument because it was not raised in the Law Division. Issues not raised before the trial court will generally not be considered "unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Plaintiff's spoliation argument is not jurisdictional in nature, nor does it implicate matters of public interest.

Even if plaintiff timely raised the spoliation argument, it would not have changed the outcome of defendants' summary judgment motion. Spoliation typically refers to the destruction or concealment of evidence by one party to impede the ability of another party to litigate a case. See Rosenblit v. Zimmerman, 166 N.J. 391, 400–01, (2001). Depending on the circumstances, spoliation of evidence can result in a separate tort action for fraudulent concealment, discovery sanctions, or an adverse trial inference against the party that caused the loss of evidence. Id. at 401–06.

The spoliation inference permits the jury to infer that the evidence destroyed or concealed would not have been favorable to the spoliator. Id. at 401–02. The inference serves the purpose "of evening the playing field where evidence has been hidden or destroyed." Id. at 401.

Plaintiff provides no support for this argument other than the fact that she saw work being done on the sidewalk in the summer of 2019. At her deposition, plaintiff testified that she does not know who made the repairs. In plaintiff's opposition to defendants' motion for summary judgment, plaintiff certified that "[t]he parties performing the remediation did not appear to be anyone from Elmwood Park. The work looked to be performed by the homeowner or their

agents." Therefore, plaintiff cannot identify the parties who remediated the sidewalk, let alone identify defendants as the spoliators.

Based upon our review of the record and applicable law, we conclude there is no genuine issue as to any material fact and that defendants are entitled to summary judgment as a matter of law. R. 4:46-2(c).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION