SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0664-21

DIANE MURRAY, administratrix ad prosequendum for the ESTATE OF JOSEPH MURRAY,

Plaintiff-Appellant,

v.

CONSOLIDATED RAIL CORPORATION,

Defendant-Respondent.

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Submitted October 25, 2022 – Decided February 24, 2023

Before Judges Messano, Gilson, and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Union County, Docket No. L-1323-18.

Bern Cappelli, LLC, attorneys for appellant (Thomas J. Joyce, III, on the briefs).

Burns White LLC, attorneys for respondent (Brian D. Pagano, of counsel and on the brief).

PER CURIAM

In this wrongful-death and survival case, plaintiff Diane Murray, administratrix ad prosequendum for the estate of her deceased husband Joseph Murray, appeals an order granting the motion of defendant Consolidated Rail Corporation (Conrail) to exclude the testimony and report of plaintiff's expert witness and a subsequent order granting defendant's unopposed summary-judgment motion. Perceiving no abuse of discretion or legal error, we affirm the expert-exclusion order. Because we affirm that order, we also affirm the order granting summary judgment.

I.

Decedent Joseph Murray worked for Conrail from 1976 to 2011 as a "brakeman/conductor." A cigarette smoker with a history of smoking eighty packs per year, he was diagnosed with tongue and throat cancer in 2011 and lung cancer in. He passed away in 2015.

On April 13, 2018, plaintiff filed a wrongful-death and survival action citing the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, and the Locomotive Inspection Act, 49 U.S.C. §§ 20701-20703. In the complaint, plaintiff alleged decedent had been "exposed on a daily basis to excessive and harmful amounts of diesel fuel/fumes/exhaust and asbestos" while working for Conrail and that his "lung cancer and/or tongue cancer was the result of the

negligence of the [d]efendant in that it employed known cancer[-]causing materials in its railroad operations," which it "knew" or "should have known, were . . . highly harmful to its employees' health." Plaintiff claimed defendant's negligence "in whole or in part, caused or contributed to . . . decedent['s] development of lung cancer, tongue cancer and death." She sought "all damages recoverable under the FELA for wrongful death and/or survival actions."

In support of her case, plaintiff retained two experts. She retained Hernando R. Perez, Ph.D., a certified industrial hygienist, as a liability expert. In his report, Dr. Perez stated he had been "asked to offer opinions in connection with the working conditions of [decedent] while employed by Conrail."

Plaintiff retained Mark Levin, M.D., a board-certified oncologist, as her medical-causation expert. In preparation of his report, Dr. Levin reviewed "various billing records, the death certificate, records of [decedent's doctors]," hospital records, and transcripts of the depositions of plaintiff and James Whitford, who had worked for defendant as a brakeman and yard conductor between 1976 and 2016 but had no recollection of ever working with the decedent. In a six-page report that included only one citation to an article about diesel exhaust and cancer, Dr. Levin rendered the following opinion:

> Based on the testimony that [decedent] was exposed to asbestos and diesel fluids for decades in his work as a

> brakeman, his frequent overtime that increased the exposure and known carcinogenicity of these substances in causing lung cancer, as well as exposure to combinations of carcinogens at the same time, I conclude that his employment at Conrail was a substantial contributing factor in the development of both his lung cancer and tongue cancer.

Acknowledging decedent had been a heavy smoker, Dr. Levin "infer[red] from [another doctor's] note that only documents smoking prior to the tongue cancer, that [decedent had] stopped smoking before or during the treatment of his tongue cancer" and, therefore, "[h]is risk of lung cancer from smoking would have then significantly reduced three years later." He found "smoking is not the only carcinogen to which [the decedent] was exposed, and both asbestos and diesel exposure are implicated as a contributory cause of both his cancers."

Dr. Levin stated his "opinions are based on [his] education, training and experience . . . ." At his deposition, Dr. Levin acknowledged he had not written any articles about diesel-exhaust exposure, diesel exhaust and cancer, railroad workers and cancer, or oropharyngeal-cancer causation. In his report, Dr. Levin cited only one article about diesel exhaust and cancer. That article came from the American Cancer Society website. Dr. Levin repeated without using quotations marks the following language from that article:

> Lung cancer is the major cancer thought to be linked to diesel exhaust. Several studies of workers exposed to

> diesel exhaust have shown small but significant increases in risk of lung cancer. Men with the heaviest and most prolonged exposures, such as railroad workers, heavy equipment operators, miners, and truck drivers, have been found to have higher lung cancer death rates than unexposed workers.

Citing an article from the American Cancer Society website about asbestos, Dr. Levin also reported "people can still be exposed to asbestos in the workplace. The American Cancer Society states that inhalation or swallowing of asbestos fibers can cause cancer" and opined "[a]sbestos does not only cause lung cancer, which [decedent] had, and mesothelioma and ovarian cancer, which he did not have, but also laryngeal and hypopharyngeal cancer. [Decedent's] cancer was in the hypopharyngeal area and involved the base of the tongue."

At his deposition, Dr. Levin testified he had not reviewed Dr. Perez's report because he understood "it was not available at the time." He also had not reviewed decedent's personnel file or medical file from Conrail. When asked why in his report he had cited only the two articles from the American Cancer Society website, Dr. Levin responded, "[t]hese are summaries and they contain all the information one needs" and "it would be superfluous to cite additional information." He stated he had reviewed "some" of the literature cited in the articles, but "didn't go through every reference." When asked to identify the literature in the diesel-exhaust article he had reviewed, Dr. Levin responded he

had "looked at" only one, a 2013 monograph from the International Agency for Research in Cancer (IARC).

Dr. Levin testified he had never visited a rail yard in a professional setting and had never seen any videos or photographs of anyone performing the same job duties as decedent "besides what you see in the mov[i]es." Regarding decedent's job duties as a brakeman, Dr. Levin stated, "[a] brakeman checks the locomotives in the yard" but admitted "I don't know the specifics." Regarding decedent's job duties as a conductor, Dr. Levin knew "conductors . . . drive locomotives" but again admitted "I don't know exactly."

In his report, Dr. Levin stated, "Mr. Winford's [sic] deposition indicates that he was exposed to asbestos and, apparently diesel fumes." When asked at his deposition about his knowledge of how decedent would have been exposed to diesel fumes, Dr. Levin again referenced Whitford's testimony: "Inhalation by working in the cabin of a locomotive or working in the yard where locomotives are going, that's the usual practice, as I understand from Mr. Whitford." However, Dr. Levin could not recall "any specifics of Mr. Whitford's testimony that led [him] to believe [the decedent] would have been exposed to diesel exhaust higher than background levels." Dr. Levin testified he did not know how diesel exhaust is measured or what industrial hygienists look for

when measuring diesel exhaust and he had not reviewed any diesel-testing reports from Conrail. His basis for concluding that decedent had been exposed to more than a minimally acceptable dose of diesel exhaust was "Mr. Whitford's testimony he was exposed," but Dr. Levin conceded Whitford had testified he had never worked with decedent. Although he recognized "dose is important when offering a causation opinion," Dr. Levin admitted he did "not know what level of diesel exhaust [decedent] was specifically exposed to."

Dr. Levin agreed smoking, independent of exposure to asbestos or diesel exhaust, could cause tongue, throat, or lung cancer and that none of decedent's treating physicians had attributed his cancer to his work at Conrail. He confirmed his opinion that decedent's tongue and lung cancers were caused by a combination of diesel exhaust, asbestos, and cigarette smoking.

On April 23, 2021, the parties stipulated to the dismissal of plaintiff's tongue-cancer and asbestos-exposure claims, leaving only "[p]laintiff's claim[] that . . . decedent was exposed to diesel exhaust at Conrail that caused or contributed to . . . decedent's development of lung cancer and death . . . ." That agreement rendered irrelevant much of Dr. Levin's report, in which he intertwined smoking, asbestos, and diesel exhaust as contributory causes of decedent's tongue and lung cancers.

The motion judge denied without prejudice defendant's first motion to exclude Dr. Levin's report and testimony. On May 26, 2021, defendant moved again to exclude them. In support of its motion, defendant argued Dr. Levin had not provided a methodology as to how he had reached his conclusions and, instead, had issued a net opinion.

In opposition to the motion, plaintiff submitted the certification of her counsel, who provided descriptions of the methodology Dr. Levin purportedly used in rendering his opinions. According to plaintiff's counsel, Dr. Levin's methodology "is two part." Plaintiff's counsel certified that Dr. Levin first determines "whether general causation exists[, m]eaning, whether diesel exhaust exposure is capable of causing lung cancer in humans." He makes that determination "by performing a literature search and referencing peer-reviewed literature from authoritative organizations." Dr. Levin then "considers specific causation," meaning "whether long-term exposure to diesel exhaust, caused or contributed to, [the decedent's] development of lung cancer." According to plaintiff's counsel, "Dr. Levin utilizes a differential diagnosis in rendering his opinion as to specific causation which is a generally accepted methodology in the field of medicine." Asserting "[t]here is no real challenge that diesel exhaust causes lung cancer," counsel attached to his certification copies of the American

Cancer Society article about diesel exhaust and cancer, a June 12, 2012 IARC press release, and a 2014 IARC monograph. Nothing in the record indicates Dr. Levin had reviewed the 2012 IARC press release or the 2014 IARC monograph counsel submitted. Counsel did not attach a copy of the 2013 IARC monograph Dr. Levin had "looked at."

The motion judge heard argument and subsequently granted the motion. In a written statement of reasons, the judge held "Dr. Levin's opinion is not supported with the requisite reliable methodology" and that "his report is a 'net opinion.'" He found "Dr. Levin's report reveals certain fundamental flaws in his methodology," including "that he deferred to Dr. Perez in regard to specific quantification of diesel exhaust exposure but did not review Dr. Perez's report until after he wrote his expert report" and "his opinion is based on his understanding that [decedent's] job tasks would require him to be 'inhal[ing diesel exhaust] by working in the cabin of a locomotive or working in the yard where locomotives are going.'" The judge found that "despite using a differential diagnosis process, Dr. Levin improperly 'rule[d] in' diesel exhaust as a cause because he lacks any evidence of the nature and intensity (i.e., 'dosage') of [d]ecedent's exposure to diesel exhaust." The judge concluded Dr. Levin had not "reliably rule[d] out other potential causes" of decedent's cancer

and that Dr. Levin's "only effort to rule out cigarette smoking" – based on his inference from a doctor's note about decedent's pre-cancer smoking that decedent had stopped smoking – was "conjecture."

The judge held that Dr. Levin's deposition testimony demonstrated that Dr. Levin "utterly lacks any personal knowledge of railroad yardwork generally or as to how the [d]ecedent could have been exposed to diesel exhaust specifically." The judge concluded "[t]he utter lack of substantiation or effort to substantiate the specific circumstances of decedent's work environment, specifically toward developing any proof of his exposure to diesel undermines the methodology employed by Dr. Levin." The judge found Dr. Levin's "critical conclusions" were based on Whitford's testimony and that that reliance on Whitford, who had no recollection of working with the decedent, "further undermine[d] the reliability of his opinion." The judge concluded Whitford's testimony "entirely fails to establish or corroborate any definable work experience to present a reliable basis to evaluate decedent's diesel exposure at his workplace." The judge viewed Whitford's "nonspecific account of [d]ecedent's work experience" as "ris[ing] no higher than . . . conjecture, which is an inadequate basis and significantly compromises reliability." Finding that

"Dr. Levin's report is no more than mere conclusions," the judge held that it was "a net opinion, and as such [it] is barred."

Defendant subsequently moved for summary judgment. In response, plaintiff's counsel advised the judge that "in light of the [c]ourt's [o]rder excluding [p]laintiff's medical expert, Mark Levin, M.D.," plaintiff did not oppose the motion because "[p]laintiff cannot prove medical causation without Dr. Levin's medical causation opinion." Accordingly, the judge granted the motion.

On appeal, plaintiff argues the judge abused his discretion in excluding Dr. Levin's report and testimony. She contends "Dr. Levin's understanding of decedent's exposure to diesel exhaust was sufficient," the judge improperly weighed Whitford's testimony, and Dr. Levin's "specific causation opinion" was based on a reliable "differential diagnosis" methodology. Plaintiff asserts we should reverse the summary-judgment order because it was premised on the judge's erroneous expert-exclusion order. Unpersuaded by those arguments, we affirm.

II.

A trial judge's decision concerning the admission of expert testimony into evidence is entitled to our deference and is reviewed under an abuse-of-

discretion standard. Townsend v. Pierre, 221 N.J. 36, 52 (2015) (noting the decision to admit or exclude expert testimony is "committed to the sound discretion of the trial court"); see also In re Accutane Litig., 234 N.J. 340, 392 (2018) (applying abuse-of-discretion standard to decision regarding admission of expert testimony).[1] The trial judge's decision to exclude an expert report should be reversed "only if it 'was so wide off the mark that a manifest denial of justice resulted.'" Rodriguez v. Wal-Mart Stores, Inc., 237 N.J. 36, 57 (2019) (quoting Griffin v. City of E. Orange, 225 N.J. 400, 413 (2016)). We review de novo a trial judge's legal determinations. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). We review de novo a ruling on summary judgment, applying the same legal standard as the trial court. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

We are mindful that "FELA's language on causation . . . 'is as broad as could be framed.'" CSX Transp., Inc. v. McBride, 564 U.S. 685, 691 (2011) (quoting Urie v. Thompson, 337 U.S. 163, 181 (1949)). However, that broad

[1] As in Townsend, id. at 54 n.5, the motion judge did not order a N.J.R.E. 104 hearing on the expert issue, and plaintiff apparently did not request one. We note that Dr. Levin had an opportunity to explain his opinions through his deposition testimony. Plaintiff does not raise the lack of a N.J.R.E. 104 hearing as an issue on appeal and does not contend that the review of Dr. Levin's report and deposition testimony provided an insufficient basis from which to make an informed decision on the admissibility of his report and testimony.

language does not eliminate a plaintiff's obligation to prove causation or strip from a trial judge his or her role as "the gatekeeper of expert witness testimony." In re Accutane Litig., 234 N.J. at 389; see also Stevens v. N.J. Transit Rail Operations, 356 N.J. Super. 311, 319 (App. Div. 2003) (finding FELA is a fault-based statute and, thus, a plaintiff must prove the "traditional common law elements of negligence," including "causation").

"New Jersey Rules of Evidence 702 and 703 control the admission of expert testimony." In re Accutane Litig., 234 N.J.at 348. N.J.R.E 702 identifies when expert testimony is permissible and requires the expert be qualified in his or her respective field. The purpose of admitting expert testimony is to "assist the trier of fact to understand the evidence or to determine a fact in issue," N.J.R.E. 702, by presenting testimony "concern[ing] a subject matter that is beyond the ken of the average juror," Landrigan v. Celotex Corp., 127 N.J. 404, 413 (1992).

N.J.R.E. 703 addresses the foundation for expert testimony. Expert opinions must "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, 221 N.J. at 53

(quoting Polzo v. Cty. of Essex, 196 N.J. 569, 583 (2008)). "The net opinion rule is a 'corollary of [Rule 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" Id. at 53-54 (quoting Polzo, 196 N.J. at 583).

Accordingly, an expert is required to "'give the why and wherefore' that supports the opinion, 'rather than a mere conclusion.'" Crispino v. Township of Sparta, 243 N.J. 234, 257 (2020) (quoting Townsend, 221 N.J. at 54). The net opinion rule directs "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 (quoting Landrigan, 127 N.J. at 417). "An expert's conclusion 'is excluded if it is based merely on unfounded speculation and unquantified possibilities'" because "when an expert speculates, 'he [or she] ceases to be an aid to the trier of fact and becomes nothing more than an additional juror,'" thereby affording no benefit to the fact finder. Ibid. (first quoting Grzanka v. Pfeifer, 301 N.J. Super. 563, 580 (App. Div. 1997); then quoting Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div. 1996)); see also Ehrlich v. Sorokin, 451 N.J. Super. 119, 134 (App. Div. 2017) ("The net opinion rule is a 'prohibition against speculative testimony.'" (quoting Harte v. Hand, 433 N.J. Super. 457, 465 (App. Div.

2013))). A judge should not admit expert testimony "if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture." Vuocolo v. Diamond Shamrock Chems. Co., 240 N.J. Super. 289, 299 (App. Div. 1990) (quoting Clearwater Corp. v. Lincoln, 277 Neb. 236, 241 (1979)).

Applying those principals, we conclude the motion judge properly excluded Dr. Levin's report and testimony. Dr. Levin's opinion clearly and admittedly was based on an assumption about decedent's exposure to diesel exhaust. Plaintiff devotes a portion of her brief to a discussion about Dr. Perez's report, arguing that report established decedent's diesel-exhaust exposure. The problem with that argument is that Dr. Levin did not read Dr. Perez's report before he issued his own report. Plaintiff's argument about Dr. Levin's purported "methodology" is not based on any statement or testimony by Dr. Levin about his methodology. Instead, in opposition to defendant's motion to exclude, plaintiff relied on a certification of her counsel, who described what he thought Dr. Levin's methodology was. See In re Accutane Litig., 234 N.J. at 392 (finding "[a]n expert must demonstrate the validity of his or her reasoning").

Dr. Levin failed to provide the why and wherefore supporting his opinions. He starts with the assumption that because decedent worked as a

brakeman, he must have been exposed to toxic levels of cancer-causing diesel exhaust and then Dr. Levin leaps to the conclusion that decedent's employment at Conrail was a substantial contributing factor in the development of his tongue and lung cancer. Dr. Levin does not explain how he came to that conclusion with respect to decedent. His report could apply equally to anyone who has ever worked as a Conrail brakeman and developed cancer. As the motion judge found, those bare conclusions premised on speculation constitute inadmissible net opinions. See Buckelew v. Grossbard, 87 N.J. 512, 524 (1981) (explaining that "an expert's bare conclusions, unsupported by factual evidence, is inadmissible").

Having affirmed the motion judge's order excluding Dr. Levin's report and testimony, we also affirm his order granting defendant's summary-judgment motion.

Affirmed.